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Prof. Harry Thurston Peck—Direct.

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ondary evidence, the books themselves being the best evidence of their contents, and the testimony of this witness being admissible only in so far as he points out identities or similarities, for which purpose the testimony is admissible to aid the Court in making its own comparison.

A. Yes, I have examined very carefully and compared these two books, with the Webster's edition, unabridged edition, of 1847, and I find that with the exception of that one point and one other, they correspond absolutely. They contain fourteen points out of the sixteen. Now, the other points that they have not noted or cared for—Webster says that in defining a word you should begin with the primary word or the primary form, the primary meaning, and take it in the order of its historical development. Now, these two books have not done that; that is, not consistently done it. Webster himself has not done it always, because he did not know—that is to say, etymology in his time was in a crude, rude, savage state; they etymologized by ear.

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Q. 33. Have you examined also the dictionaries of 1828, 1847 and 1864? A. I have.

Q. 34. Are these dictionaries substantially similar in so far as they contain matter which could be and is used in these small dictionaries?

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MR. HALE: Objected to as incompetent, irrelevant, immaterial, as assuming a matter not proved in that the question assumes that matter contained in any one of the dictionaries mentioned of the Webster series are also contained in the defendants' dic-

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Prof. Harry Thurston Peck—Direct.

tionary involved in this suit, which fact has not been proven.

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A. It is a mere question of exhibiting the books. My examination tells me that the principal definitions under each head where the words coincide in the three dictionaries are identical, not merely in style or in thought and meaning, but in actual words; that sometimes a dozen definitions in order have been taken outright from Webster word for word, from the 1828 Webster or the 1847 or the 1864 Webster; it does not make much difference. Webster kept his definitions pretty much the same. They have been taken out of Webster and therefore they are Websterian and Webster's.

6215

Q. 35. Do you mean by the last part of your answer that sometimes twelve words in immediate sequence which are found in the two dictionaries of the defendants, have been taken outright from the three Webster's dictionaries which you mentioned?

MR. HALE: Objected to unless the witness will point out the words.

6216

A. No. I say there may be breaks, but I said where they appeared in all three. I don't know—I would not swear to that that there are twelve consecutive words, but twelve that are consecutive in the three books. That is as true of the 1864 as it is of the 1828 or the 1847. You cannot pin these books down to anyone of Webster's dictionaries, because Webster or his successors have followed faithfully his system of definitions. Where they have changed the definition I don't think they have improved as a rule; consequently

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6217

these books, you cannot say whether they took them absolutely from the 1847 or 1864 or 1828, but I find that they might have taken them from either one or all, because Webster was fond of his own definitions and while he was alive he did not change them.

Q. 36. Have you examined critically the 1864 edition of Webster's Dictionary? A. Yes, the only part that counts. The introduction has no relation at all to the other two books we are speaking of, the books of the defendants, but the vocabulary I have examined quite carefully. 6218

Q. 37. What conclusions have you reached from your examination of the 1864 book?

MR. HALE: Objected to as incompetent, irrelevant, immaterial, and not within the issues, the question is further objected to as too general. Attention is also called to the fact that the 1864 edition of Webster's Dictionary was a copyrighted book at the time the defendants' books purport to have been compiled. 6219

A. It would not make any difference; you would find the same thing in the '64 and in the '47. The best definitions are those that Webster made himself and those who followed him never improved, to my mind; they added words but they have always kept the Webster definition somewhere. They are Websterian, you know. 6220

Q. 38. Now, then, answer the question: What conclusions did you reach from your examination of the 1864 edition? A. That they were essentially based or based upon the unabridged Webster's Dictionary of 1847, 1828 and 1864 possibly, but certainly 1828 and 1847.

6221

Prof. Harry Thurston Peck—Direct.

Q. 39. Did you compare in connection with your comparison of the vocabulary of the 1847 Webster with the two dictionaries of these defendants certain specimen pages? A. I did.

Q. 40. Have you marked those pages in red and blue? A. I have.

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Q. 41. Are these those pages (handing witness papers). I show you Exhibit C, filed with your affidavit, which was offered in opposition to the motion for preliminary injunction made by complainant in this case (handing witness Exhibit C). A. Yes, United States District Court.

Q. 42. Those specimen pages are taken from the Webster's New Illustrated published by the Syndicate Publishing Company? A. Yes, they are marked according to a system.

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Q. 43. What is that system? A. The word or words underlined in blue show that the said word or words are identical with those contained in the 1847 Webster in defining the same words. An upright blue mark in the margin opposite a paragraph shows that the paragraph is an abridgement of the like definition or definitions in Webster's treatment of the same word. In the third place, a word underlined with red in Webster's New Illustrated shows that it is not contained, or the definition was not taken from the Webster 1847. A red "O" in the Webster 1847 by the side of a word shows that it does not appear in the Webster's New Illustrated.

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MR. CARROLL: I offer these specimen pages in evidence, they having been already filed in connection with said affidavit, and having been taken off the files merely for the purpose of this examination.

Prof. Harry Thurston Peck—Direct.

6225

(Pages referred to are marked Defendant's Exhibit C, June 14th, 1912, JAS. Exr.)

Q. 44. Have you made the comparison of both Webster's New Century Dictionary and Webster's New Illustrated Dictionary? A. Yes. I used them side by side and in that way they were compared.

Q. 45. Are the pages which you have taken from Webster's New Illustrated Dictionary and used in this exhibit which you have just explained practically identical with the pages in Webster's New Century Dictionary? A. Yes. There may be a few words different, but practically they are identical.

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Q. 46. So that if you had mechanically prepared similar pages taken from Webster's New Century Dictionary, the same result would have appeared as that which appears from these pages? A. Yes, absolutely.

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Q. 47. Are these all of the pages which were examined by you? A. Oh, no, I examined a great many more. I did not think it necessary, however, to paste them up and get them into shape. They are taken from the first and the middle and the last of the book, and I can furnish more. I have in fact prepared a number of others, but it would take some days to put them together and put them in that form.

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Q. 48. Are these pages taken at random? A. Yes, quite at random. I intentionally took some from the beginning of the book and some from the middle of the book and some from the end, and they were taken without looking to see what was in them at all, and then I proceeded to compare them.

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Prof. Harry Thurston Peck—Direct.

Q. 49. From your examination of these books are you able to state what proportion of them is taken bodily from the Webster's Dictionary of 1847?

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MR. HALE: Objected to as incompetent and as assuming that any portion of them was in fact taken from the 1847 edition of Webster's Dictionary, which is a fact not yet shown, and as not the best evidence, but merely the opinion of this witness; the best evidence being that of the editor who compiled the dictionary, Mr. Roe, with whom the defendant has been in communication, and who can be called.

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A. I would not endeavor to answer that. That is, I made no statistical computation, because I think the pages speak for themselves. You have there portions of the books marked in accordance with a definite system, and that is perfectly intelligible at sight and can give anyone a very definite opinion from examination; not to an exact degree of percentage, but in a general way.

Q. 50. Did you make an examination of the prefatory portion of each of these dictionaries of defendants? A. I did.

6232

Q. 51. Did you also examine the introductory portion of the Webster's Dictionary of 1847? A. Very carefully.

Q. 52. I show you Exhibit B, which was filed with your affidavit in opposition to the motion for preliminary injunction in this case, and ask you if that is the introductory portion of Webster's Dictionary of 1847? A. Yes, that edition.

Q. 53. Does that contain the sixteen require-

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6233

ments which you have mentioned? A. Yes; the eight criticisms of Johnson and the eight points about Webster.

Q. 54. Where are those to be found in this exhibit? A. Why, here they are (indicating), and they are appropriately marked in red so that you will find them without any difficulty.

MR. CARROLL: I offer that in evidence.

(Papers referred to marked Defendant's Exhibit B, June 14th, 1912, JAS., Exr.) 6234

Q. 55. I show you Exhibit A, filed with your affidavit in opposition to the motion for preliminary injunction in this case, and ask you if that contains the prefatory or introductory portion of Webster's New Illustrated Dictionary? A. Yes, and of the other one.

Q. 56. And of the New Century? A. Yes.

Q. 57. What does your critical examination of these prefatory or introductory portions taken from Webster's 1847, and from the New Illustrated and New Century Webster's show you? A. It shows me there is no particular resemblance, except in the part relating to the origin or development of the English language, but there I should say it is my opinion after careful examination that the two and a half pages or three pages of both the books in question as compared with the Webster's 1847 had been drawn from the Webster 1847. They had condensed practically a long dissertation into a very short large lettered monograph. The ear-marks of likeness are the description of the account, the way in which they have followed the order of Webster in the parts that they have chosen to take; that is to say, the development of early English, and finally the blos- 6235 6236

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6237

soming of modern English. They make the same reference, they refer to the same persons, and they in general seem not to have copied the wording verbally but to have copied the source, and necessarily they must have compressed it to get it in three largely lettered pages; they could not have done otherwise.

MR. CARROLL: I offer this in evidence.

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(Paper referred to marked Defendant's Exhibit A, June, 14th, 1912, JAS. Exr.)

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Q. 58. I find in your Exhibit B the introductory portion of the 1847 Webster at pages 50, 51, and 52, that you have marked certain paragraphs in blue? A. Those all go in that one thing. That is to say, I hold that the editor, in writing that matter about the origin of the English language and development of it, took bits all through this introduction here where it was historical, where it represented a part of the history of the English language, and that means—this is a part—you notice they speak of Anglo-Saxon and Norman French. You will find a number of these marks scattered through, because they did not take any one place. Webster was too diffuse for them, and so I read a great deal here and found the parts from which undoubtedly in my mind they culled, but they could not take it verbally, it would be too long, so I marked the passages that show the likenesses. Here is another one down here, page 51, they speak of Chaucer and all that. That is all indicated in blue marks. In fact, here is the end where it comes down to Queen Elizabeth, William and Mary, and King George. That is all marked, not because of any verbal similarity but because of the likeness in substance.

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Prof. Harry Thurston Peck—Direct.

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Q. 59. From your entire studies in connection with these two books of the defendant and in connection with your examination of the 1828, 1847 and 1864 Webster's Dictionary, what would you say about the two books of the defendant as to whether or not they are properly called Webster's Dictionary?

MR. HALE: Objected to as incompetent, irrelevant, immaterial and as calling for the opinion of the witness and his conclusion upon the matter at issue which is for the Court to determine, also calling for the conclusion of the witness upon a question of law.

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MR. CARROLL: It is not a question of law but a question of literature. This witness has been qualified as an eminent expert in all matters pertaining to literature, particularly the literature of the English language and English lexicography. His opinion as to the Websterian qualities of these books, and as to the propriety of calling them Webster's Dictionary is of the utmost importance.

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MR. HALE: There is probably no objection to the witness describing the literary contents of the book as Websterian in the sense in which he has defined that term, if deemed material, but there is an objection which has been stated to the witness expressing his opinion as to whether or not these books are properly called Webster's Dictionaries, the issue being as to the identity of the books designated by particular names and not as to whether they are Websterian or near Webster in quality.

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Prof. Harry Thurston Peck—Cross.

A. My opinion is that both of these books contain so large an amount of actual material taken from the Webster Dictionary of 1828, 1847 and 1864, and for the rest following so closely the scheme of the dictionary outlined by Webster himself that it is entirely proper to speak of each or both as Webster's, as the material is Webster's and the scheme is Webster's; the mere difference is in the form of printing and the lack sometimes of care. That is nothing to the 1864. But there is no more lack of care in these two dictionaries than in the Webster of 1864.

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Q. 60. What lack of care was there in the 1864?

MR. HALE: Objected to as irrelevant and immaterial, the merits of that book not being in issue.

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A. Misprints and errors of etymology, and the leaving out of a great many important words that were put in subsequently and that had been in the old Webster's Dictionary. I don't know how it happened, except naturally probably in throwing the whole thing into the caldron and stirring it up something fell out.

MR. CARROLL: That is all.

Recess until 2:30 P. M.

6248

CROSS EXAMINATION by Mr. Hale:

x Q. 61. Dr. Peck, what is your present connection with the Syndicate Publishing Company, if any? A. I am literary advisor and when they wish to have any of their publications, any particular additions made to their works, like some of the encyclopedias they publish, I prepare the matter.

Prof. Harry Thurston Peck—Cross.

6249

x Q. 62. How long have you been connected with the Syndicate Publishing Company in that capacity? A. Well, ever since August of last year.

x Q. 63. Since August, 1911? A. Yes.

x Q. 64. Had you ever done any literary work of any kind for the Syndicate Publishing Company before that date? A. No.

x Q. 65. You took no part then in the compilation or revision of the book published by them under the title "Webster's New Standard Dictionary" or "Webster's New Illustrated Dictionary?" A. Yes, I took some part in the preparation or at least in the alteration of Webster's New Standard Dictionary. They got out a small edition of that after I came to them and provided them with a list, rather hastily made, of typographical errors and suggestions for new words and so forth.

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x Q. 66. What date was that? A. That was in August, right then and there, because they began this Websterian at once, but in order that they might have copies enough of the Webster's New Illustrated, they printed from the plates before they were broken up, I don't know how many small editions, and while they were doing it I had been making an examination of it at Mr. Wright's request, and as a result of that examination I gave him a list of alterations, not enough, you understand—I did not go through it concisely and carefully and all that, but such things as came to me in the examination of it.

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x Q. 67. If I understand you correctly then in about the month of August, 1911, you suggested corrections or changes in their then existing Webster's New Standard Dictionary which were in-

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Prof. Harry Thurston Peck—Cross.

corporated in a small edition of that book published after that time? A. Yes.

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x Q. 68. About how many corrections or changes did you suggest at that time? A. Oh, a very small number. I did not suppose it was enough to count; just things that came to me that seemed to be necessary, about twenty or twenty-five or thirty perhaps,—just a strip of paper. I don't think they reprinted the whole. That I had really nothing to do with; I had nothing to do with the book except that. I went to work on the Websterian and that took a great deal of time, twelve or fourteen hours a day.

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x Q. 69. What you call the Websterian is a book issued by the Syndicate Publishing Company called the New Websterian Dictionary; is that correct? A. Yes. Let me speak of it for convenience perhaps by the term "Websterian" because I don't know of any other book by that title; New Websterian Illustrated.

6256

x Q. 70. In what connection had you been examining their previous book, Webster's New Standard Dictionary or Webster's New Illustrated Dictionary prior to August, 1911, and which led to your suggestion of a few changes? A. No direct capacity, in no direct connection with the firm, but in the anticipation of my making another dictionary. Mr. Wright asked me to look over and examine the New Webster's Illustrated so that I could see about the size, number of pages, and the general style of treatment which were found in that book, and which he wanted me to bear in mind in a certain way in making a new one so it would not be a violent break; the new one would run into the old. After the old one was exhausted the new one could be put upon the market.

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6257

x Q. 71. As its substitute? A. As its substitute, or as a Webster's dictionary.

x Q. 72. About what was the date of that conversation with Mr. Wright, the first one on that subject? A. It was some time in August; I could not give you the date, but it was a matter—he asked me first if I would be willing to prepare a dictionary and then he said, "Well, before you make any arrangements about it, you take this and look it over." So I took it with me and looked it over. 6258

x Q. 73. Subsequently did you prepare the proposed new dictionary? A. Yes.

x Q. 74. Which has since been published under the name of the New Websterian? A. Yes.

x Q. 75. In preparing that dictionary did you have occasion to examine somewhat closer the previous dictionary? A. Yes, in fact, quite a little of the dictionary was incorporated in this. 6259

x Q. 76. So you went over the previous dictionary then word by word in the compilation of this second dictionary? A. Well, not quite word by word, no, but still quite thoroughly.

x Q. 77. Page by page at least? A. Page by page, yes.

x Q. 78. Did you cut up and use any part of the previous book as copy for the second dictionary? A. Certain parts of the old one were pasted on sheets and then were written all around and changed about as much as, for instance, one of the Merriam's books would be changed when they made a new edition. 6260

x Q. 79. In other words you made a real thorough revision of the prior book? A. More than that, unless you call a revision a remaking. If I had gone through it and corrected it simply that

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would have been a revision; going through it and adding five or ten thousand words and taking out perhaps several thousand words, altering the definitions and having added by the gentlemen whose names are there a large amount of prefatory matter which the old did not contain seems to me more than a revision.

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x Q. 80. I agree with you in that view. Would you say that this book prepared by you, the new Websterian, was based upon or founded upon a previous book called the Webster's New Standard Dictionary in the same sense that you have expressed your opinion that Webster's New Standard dictionary of the defendant is based upon or founded upon Webster's dictionary of 1847? A. No, this is more truly based upon Webster's dictionary of 1847 definitely. This Websterian book is based more definitely upon the Webster of 1847.

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x Q. 81. More so than its predecessor the Webster's New Standard dictionary? A. No, except that I used the New Standard Dictionary and then I had beside me the Webster 1847, because there was a good deal of information that was not in the other, for example, modern words in the vocabulary in modern words, of course, the 1847 Webster was substantially—well, it didn't have them in at all; words that developed since 1860 at any rate, and so going to that would not have done me any good, but there is the great bulk of literary names which does not change from generation to generation that I went to the Webster's 1847 for, and also examined the so-called Webster's 1828 and the Webster's 1864, although the Webster's 1864 not so much, because I did not think it was good.

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x Q. 82. In this book that you compiled the you did actually take some of the matter from the 1847 edition of Webster's dictionary? A. Oh, yes, a great deal.

MR. CARROLL: I object to all this line of cross examination as utterly irrelevant and immaterial inasmuch as this Websterian book is in no way at issue in this suit.

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x Q. 83. Did you write the preface to the book called "New Websterian"? A. I wrote the preface using in it three or four sentences which were contained in the other, or perhaps paraphrasing them, I think is the better word. I would have to read them both through in order to tell you now.

x Q. 84. In this preface you refer to five rules that were first set forth by Dr. Webster in 1828. How do you reconcile that with the sixteen principles which you have stated upon your direct examination? A. Five rules? No, I meant five principles, which seemed to me the really important ones; that seemed to me did not matter. There are some there that lexicographers have taken out anyway, you will notice they are numbered five in the book. My numbering of fifteen is not Webster's numbering. I have split some of his principles and made two parts of them, especially with relation to etymology and orthography, where he has one paragraph and marked it 1, I may mark it 2.

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x Q. 85. In this preface I find the following language: "Dr. Webster for a long while had pondered over the subject of lexicography; and he came to his task with a full mind and with a definite conception of certain fixed principles as

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to what ought to go into the making of every dictionary. In the introduction to his original work he sets forth the principles so clearly and so convincingly as to constitute what we may call a Websterian method. The principles thus laid down if followed carefully entitle any lexicographer to call his book "Websterian", whether or not Webster himself ever had a hand in making it or whether any part of it be taken from a work of Webster. Many others have made dictionaries. Even some of Webster's descendants have done so; but in every case it may be said that by violating or forgetting the fundamental laws of Noah Webster, they have lost the right of using either the name "Webster's" or "Websterian." You then proceed to summarize the five rules; is that your language? A. That is what I wrote.

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x Q. 86. And does that accurately express your views upon that subject? A. Yes.

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x Q. 87. And is it in accordance with the theory there expressed that you have testified to-day that the defendant's book, Webster's New Standard Dictionary or Webster's New Century Dictionary are properly called "Webster"? A. Yes, because they have not departed essentially—you must understand that Noah Webster when he was writing had in mind entirely an unabridged dictionary; he was not talking about an abridgement or condensation, and therefore his requirements were very much higher, at least very very much more diffuse, he required more things than he would, as to an abridged dictionary. For example, in his own case, take abridgements that are made from his later edition; they don't contain all the sixteen points, but that is rather different.

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x Q. 88. But is this the concise statement of the principle or theory upon which you stated upon your direct examination that the two books involved in these cases are properly termed a Webster's dictionary? A. Yes, they are properly termed a Webster's dictionary, because they retain so far as Webster would himself have retained in an abridgement the principles that he set forth and that were vital. Some of his principles are not so important as others, though he himself always followed them out. There is a mass of principles. In other words, if you get the Webster feeling, and you see that the thing is done in a Webster manner, you don't cavil and carp as a rule at a particular illustration you may find or definition or something, but you take the book as a whole to see whether it is constructed on a Websterian basis.

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x Q. 89. All I want at present is a fair and accurate statement of the theory or principle upon which you expressed your opinion upon that subject, and I presume this quotation from the language of the preface written by you is such a statement; is that correct?

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MR. CARROLL: I object to this question on the ground that the witness has already summarized his theory at least a half a dozen times throughout the testimony.

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x Q. 90. Is that correct? A. I would say yes, with the exception that in one case I have said sixteen by cutting up paragraphs, and here I mentioned five because they are taken as Webster took them and massing them in large paragraphs.

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x Q. 91. Is there anything in the quoted statement from your preface which you wish to qualify or change other than you have already done so?

A. Not to my knowledge, no. I might read it over and see. You must understand though, that I put on record the fact that the five principles in the one are identical with the sixteen principles in the other; that is only a way of grouping them, that is all.

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x Q. 92. In the quoted statement I find the sentence: "Even some of Webster's descendants have done so, but in every case it may be said that by violating or forgetting the fundamental laws of Noah Webster they have lost the right of using either the name "Webster's" or "Websterian."

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x Q. 93. To what works were you referring in that sentence? A. I was thinking of the 1864 Webster chiefly, because I know more about that than I do about the later ones, and I think by the infusion or injection of technical terms, although Webster himself says that you should have a modicum of technical terms, they have gone beyond the original quasi-encyclopedic method and have gone over into, the class of works which is represented best by the Standard Dictionary. Furthermore, if I may make another criticism on that book which I have in mind, they have made clumsy and awkward what Webster himself made easy and not difficult. That is, they have divided and sub-divided and they have taken one verb and put it under so many heads and they have had, not even verb transitive and intransitive, but they have had two or three verbs transitives and verbs intransitives and it was confusing. Now, Webster was always clear himself, but when it got into the hands of the Philistines it ceased to be

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Websterian. I cannot tell you much about the latest Webster, the latest book that was published by the Merriam's at any rate, because I have not used it.

x Q. 94. By the "Philistines" do you mean the Merriam Company? A. No, I mean anybody who chooses to alter the thing. That was a quotation anyway, you know, and not seriously meant, "in the hands of others." I think the biblical use of Philistines very often refers to an outsider. I was using the German sense, "Philister."

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x Q. 95. Is it your opinion that the 1864 edition of Webster's Dictionary published by the Merriams was not properly termed Webster's Dictionary? A. Well, I should say it was not Webster's Dictionary in the original sense.

x Q. 96. You have testified that the defendant's book in this case was properly termed a Webster's Dictionary? A. Yes.

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x Q. 97. And do you now testify that Webster's Dictionary of 1864 was not properly termed a Webster's Dictionary? A. I say it was less properly termed a Webster's Dictionary than that which Webster himself made; that they are one or two or several steps away from the Websterian edition.

x Q. 98. Are you aware of the fact that the 1864 edition of Webster's Dictionary was a book which became so widely known as Webster's Unabridged? A. Well, I think they all talk of Webster's Unabridged. Do you mean the 1864?

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x Q. 99. Yes? A. I don't think that is a point at issue; I mean to say, all the large dictionaries that are published either by Webster himself or by the Merriams were all unabridged, if they were unabridged. I did not know that was unabridged

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par excellence. Of course, you say Webster's unabridged, to distinguish it from Webster's abridged.

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x Q. 100. Don't you know that the 1864 edition of Webster's Dictionary was the one which was involved in the literary controversy waged through the public press and by pamphlets between Webster and Worcester as standard dictionary authorities in this country some forty years ago or more? A. Well, it could not very well have been, because Webster was dead. You said 1864, didn't you?

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x Q. 101. Yes. I am talking about the controversy over the books which ensued around or shortly after the publication of Worcester's Dictionary? A. That is to say, Webster had himself been revising and Chauncey Goodrich had also done a good deal of revising. Webster, however, was out of the field. He was feeble and old, as I understand, and Chauncey Goodrich had done considerable work which afterwards was incorporated in the 1864 dictionary, and that dictionary has the curious distinction of having as its chief editor a man who had been dead four years before it was published, and that was Chauncey Goodrich. I understand perfectly that the encyclopedic features which Webster admitted in his early books, which the Merriams have very largely increased, has widened the breach manifestly between the Worcesterians, if I may call them so, and the Websterians, and I know about the controversy to which you allude, but the controversy was carried on more on the outside than on the inside.

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x Q. 102. However, the books involved in that controversy were Worcester's Dictionary upon

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the one hand, and the 1864 edition of Webster's upon the other; is that not correct? A. Well, that is correct, but you must remember that Worcester's Dictionary came out first. It was a matter of four years—Webster's Unabridged was four years later.

x Q. 103. For how many years was Webster's Dictionary, the edition of 1864, the standard dictionary in general use in this country? A. Until about after the death of Chancey Goodrich, when Noah Porter took charge as sole editor as I understand it.

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x Q. 104. I think you misapprehend the question. For how many years was the 1864 edition of Webster's Dictionary published and used as the standard dictionary, known by the name of Webster's Dictionary among scholars and literary people in this country after its publication in 1864?

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MR. CARROLL: I object to the form of that question on the ground that it has nowhere been proved nor has this witness stated that Webster's Dictionary of 1864 was ever the standard Webster's Dictionary; in fact, he has already testified that he did not consider it a true Webster.

A. Well, there were other editions that bore the name of Webster. In fact, Webster, himself, you know, with Worcester, wrote one together, which was considerably in vogue, and I don't know whether that is a Worcester or a Webster. It is a kind of a Hybrid, but it was certainly a scholarly work, and after the publication of the 1864 book which bore the name Webster published by the Merriams, it was put forth and advertised by the

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Merriams as the Standard Webster Dictionary. I did not say it was necessarily so accepted by scholars and literary men at all. I say that was the contention of the publishers, but as a matter of fact it was a very different book, and those who held with Worcester, I think, you will find a higher type of literary men and scholars is represented by the Worcesterians, a more finical type of scholar than by those who follow the Merriam Webster's, and they regarded the book I think with no very great admiration, or held it up as a standard at all, except the parts that were written by Professor Hadley in the preface and various other prefatory matter written by particular men, but I think the Webster, Webster as such, had gone out. I think it had become extinct. I think furthermore, if you wish me to say so, that the only prestige attached to the name of Webster is due to the other Websterian work which has been sold in great quantities all over the country at a less price, and represents to-day to the popular mind the lexicographical and glossological views of Noah Webster, and to get them in their entirety you have got to go back of the Merriams, you have got to go back of 1847. And that was not really a Webster book, though Goodrich did not change it very much.

6296

MR. HALE: The answer of the witness is objected to as not responsive and motion is made to strike it out.

x Q. 105. You say you remember the controversy waged between Worcester and Webster subsequent to 1864? A. No, I don't remember any such thing, because Webster could hardly wage a controversy after he was dead.

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6297

x Q. 106. I referred to the controversy between the two publications? A. Yes, the clash of books as you may call it.

x Q. 107. Clash of books, yes. You remember that? A. Oh, yes.

x Q. 108. And you state some scholars and literary men preferred Worcester? A. Yes.

x Q. 109. Some upon the other hand preferred the Webster 1864? A. Yes, and they would naturally term it the unabridged.

6298

x Q. 110. How long now was the unabridged Webster 1864, the book, published, sold and used under the name of Webster's Dictionary as that authority? A. Down to 1891.

x Q. 111. And it was succeeded by what book? A. By the International Dictionary of Noah Porter.

x Q. 112. And during all that period it was customary for scholars and literary men and for other persons to refer to one or the other of these books by the term Webster's Dictionary, was it not? A. You mean Webster or Worcester?

6299

x Q. 113. I am speaking of the book published by the Merriams when they preferred or used that as distinguished from the Worcester Dictionary? A. I am speaking of scholars and literary men. They would naturally speak of an unabridged book, and when they talked of an unabridged book and they would say a Worcester, they meant a Worcester, the unabridged Worcester.

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x Q. 114. And when they meant the Merriam book what name did they use? A. I say when they spoke of a Worcester they meant the unabridged work of Worcester himself. When they meant an unabridged representative of Webster, they might or might not speak of the 1864 edition

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brought out by the Merriam Company. I have no doubt that there are a great many as you say—and other people too, no, other people I don't think necessarily did—I know as a young man in a great many houses they had Webster's Dictionary. The Webster's Dictionary was the 1828 folio edition, and they did not go around and buy the book at ten dollars or six dollars afterwards when the Merriams got hold of it, because those books were too expensive, and Webster's Dictionary would go down in the family like so much old plate, and the 1828 Webster was the Webster, they might mean I think one of several books. They might mean the original Webster of 1828 which was really a Webster; they might mean the sort of hybrid Webster which was largely prepared by him but was published by his son-in-law in 1847, or they might again, because of the name on the cover, and the advertisement, mean the work published by the Merriams from the beginning of 1864 down until 1891.

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x Q. 115. By what name was the Merriam Unabridged Dictionary of 1864 commonly referred to from that date until the publication of the International? A. As an unabridged. You might say Webster's Unabridged, because that was the name that was put upon the back by the Merriams.

6304

x Q. 116. And that was the name by which it was ordinarily and usually called, was it not? A. As an unabridged book.

x Q. 117. Webster's Unabridged, was it not? A. They would say Webster's Unabridged, but they did not imply that there were not other Websters besides. That was an unabridged book.

x Q. 118. Is it your opinion that Webster's International Dictionary published first in 1890 was

not properly termed a Webster's Dictionary? A. I should say that it was termed a Webster's Dictionary somewhat as we said in discussion that Webster's New Illustrated is termed a Webster's Dictionary, no more, no less; that is, it had drawn very largely from the original Webster just as this small one was drawn. That was a large sort of watered Webster, and this is a small condensed Webster. The word Webster had become common; simply those who drew from the uncopyrighted Webster usually brought out abridged editions that made the distinction, because of course a scholar wants a large unabridged work.

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x Q. 119. I gather then that it is your opinion that none of the dictionaries published by the Merriam Company after the 1847 Edition is properly called a Webster's Dictionary; is that correct? A. Ah, yes, they are all properly called Webster's Dictionary.

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x Q. 120. And they have in fact always been called Webster's Dictionaries, were they not? A. Yes, they have, but I don't mean that there is any monopoly, for example, in the name. There ceased to be a Webster's Dictionary which you can put your finger on and say that is a standard dictionary.

x Q. 121. There has never been a standard dictionary authority in this country then known by the name of Webster's Dictionary since 1847; is that correct? A. There have been a number of books that have been so called, so-called in the advertisements by their publishers, and so-called by many people, but I hold that other books have also been called Webster's Dictionary and will continue to be and are. In fact, as I said before their sale, has kept up the prestige of the Merriam Webster.

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x Q. 122. What are the other dictionaries published under the name of Webster that have made the name famous in connection with dictionaries? A. Well, of course, the fame originally came before the Merriams were ever heard of. That is to say, the fame came when Webster brought out his 1828, and that was used and is used to-day, and the 1847 was really Webster's own work, to a great extent, except so far as special contributions were indicated in the introduction.

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MR. HALE: The answer is objected to as not responsive and motion is made to strike it out.

x Q. 123. Please specify particularly the books under the name of Webster which have been published since 1847 and which have contributed to the reputation of the name Webster in connection with dictionaries? A. Which have continued the reputation of Webster.

6311

x Q. 124. Name those books? A. There is the Ogilvie book which bore the name of Webster, that book by John Ogilvie, which I mentioned this morning.

x Q. 125. You mean the English edition? A. Yes. It was very highly technical, and done in a very scholarly way.

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x Q. 126. When was that published? A. That was published first in 1850, and the last edition of it—I am not sure whether it was the last edition, because it was merged, or at least used for the Century; but you objected to that answer this morning. Then I may say it is a matter of publicity. You are perfectly well aware of that. The Merriams don't advertise Webster's Dictionary very much. You would hardly know there was a

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Webster's Dictionary in the country if you left it to them; but all the other publishers of Webster's Dictionary, or the Websterian Dictionary, which ever you like, spend immense amounts of money advertising their books, and they sell them at prices—very good books they are, too, many of them—they sell them at prices which put the possession of them in the hands of people that could not afford to buy a great big, unabridged, ten or twelve dollar book. So I say that every book that bears the name of Webster's Dictionary has contributed to the benefit and the pecuniary profit of the Merriams, and in a way to perpetuating the name of Webster in connection with dictionaries. If there were not any small dictionaries bearing the name of Webster, I don't believe the Merriams could make any money out of their work. There have been millions of dollars spent in advertising these abridged dictionaries, and I think really the Merriams are making a mistake. I think they are cutting off their own noses as far as they can.

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MR. HALE: The answer is objected to as not responsive, and motion is made to strike it out. The witness is requested to please answer the question directly.

THE WITNESS: The witness will.

x Q. 127. I gather that your examination of Webster's New Standard Dictionary of the Syndicate Publishing Company, especially in connection with your compilation of the book called the New Websterian has made you very familiar with the contents of the Webster's New Standard Dictionary? A. Yes.

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x Q. 128. And it is partly upon that examination that you have based your testimony here to-day? A. Why, yes, naturally. That is what I was called in for. I was not supposed to testify about the Websterian.

6318

x Q. 129. And do you express it as your deliberate opinion that the Webster's New Standard Dictionary of the Syndicate Publishing Company conforms to all the principles laid down by Noah Webster in his introduction to which you have referred? A. All, so far as is possible in a condensed dictionary as opposed to an unabridged; that is to say, Webster had no notion of introducing etymological features.

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x Q. 130. We will bar etymology. A. Very well. In the second place it certainly conforms to one of Webster's most cherished views or principles that the vocabulary should be fresh and should be new, and that it should even include words whose place in the language is still undetermined so long as they are in use. You might have to take them out afterwards, but he believed in putting them in. That was the principle. I was particularly struck by the vocabulary of the Webster's New Illustrated in that it contained so many words of such recent origin, such as would not be found, I am sure, in fact, in many cases I have examined them, in any work published by the Merriam Company.

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x Q. 131. Do you claim that the new words added to— A. (Interposing). Of course they might be contrary to the principle of the present editor and his staff. Then there is a third point, because of the necessity of compression in the Webster's New Illustrated the words are not arranged, the definitions don't necessarily follow

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the historical development; neither do they in any dictionary whatever, completely, except the dictionary which is not finished, and that is the new English dictionary, the one I mentioned this morning, the Murray Dictionary, which does absolutely do so. But the others say they ought to do it but they don't. So I say that it conforms to those sixteen points as far as Noah Webster himself as shown in some of his own abridgements would make it conform. The main thing in a small book is, not the order of words, it is not the etymology, although there is some etymology in this, but it is in the definition. That is what the average man wants when he has the book by his side in the shop or in the office, simply to define a word, and how to spell it.

6322

x Q. 132. Spelling is as important as definition, I presume? A. Yes. And Webster consistently altered the spelling in three particular features, which I suppose I need not mention. That is an old story. In other words, he criticised Johnson for his orthography because it was not on principle. Webster wisely made three important series of changes in the orthography of his book and they were such that it did not jar people's nerves at all; their linguistic or orthographic nerves.

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x Q. 133. Please state fully Noah Webster's principles of spelling as exemplified in his dictionary? A. Well, his principles of spelling—in the first place, I might quote him, if you will allow me.

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x Q. 134. I wish you to go as far as you please? A. In the last of his eight principles and on his own book he thinks the spelling of the language should be simplified, but in that he has not gone

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so far as he would wish, but he simplified in this way: In the first place, the three great simplifications which he effected and carried out and which dropped into the language, and they have even been adopted to some extent in English. That is, he has changed the spelling of the words in "our," like "honor," and "Saviour" to "or." And he did that as he said on principle. It was unprincipled really, because he had mistaken the words that came into the English from the Latin and French, and those that came directly from the Latin. However, that was his theory and principle, but he really was not much more correct in his principle than Johnson. The second point was that he changed the "ll" in words ending in "ller," to a single "l," making it like "traveler." Then finally he made a very important change when he altered the endings of words ending in "re" into endings in "er."

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Those were simple things. They did not jar people much. They modified very essentially the principles of our orthography, which in those cases had been Latinized or Gallicized and made them what he regarded as more truly English. Of course, he made a number of other spellings, but those three I call the three great successful changes that he made in the orthography of English.

6328

x Q. 135. Was it also one of Webster's principles upon which he laid stress that words of the same class should be consistently spelled in the same way in the respect mentioned or other respects alluded to by him? A. Yes.

x Q. 136. He laid considerable stress upon that, did he not? A. Yes.

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6329

x Q. 137. Have these changes, those introduced by Noah Webster, been consistently followed in the defendant's book, Webster's New Standard Dictionary and Webster's New Century Dictionary? A. In the main, yes.

x Q. 138. What do you mean by "in the main"? A. I say, there may be some exceptions, just as there may be exceptions in Webster himself, but in the main, that was the object of the editors, I take it, from what I have seen of the book.

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x Q. 139. How far has he succeeded in that object, if that was his object? A. Oh, he succeeded; he succeeded sufficiently to show that he was following the example and precept of Webster.

x Q. 140. Do you know of any instance in which he did not follow the spelling adopted by Webster in the respects mentioned? A. I have none in mind at present.

x Q. 141. Did you discover any in your comparison of the book? A. Yes.

6331

x Q. 142. Did you change them to what you have termed the Websterian form in your compilation of the New Websterian Dictionary? A. No. As a matter of fact, I never held with Webster in those things, and to a certain extent I went back; words derived from the French, for example, I restored very largely, and whenever I had a chance; that is to say, after I made up my mind about it I changed back to the "re" which I prefer. I think it is more elegant and more consistent with the origin of the word. I don't believe in the Webster changes. I only say they were successful. I would not have one of them myself.

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x Q. 143. Did you think it Websterian for a

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dictionary to spell some of the class of words to which "center," "theater" and other words of that class belong with the final "re"; and other words of the same class with the final "er"? A. Well, it would be more consistent with Webster to have them all of the same type.

x Q. 144. And that was a principal upon which Webster laid stress, did he not? A. He laid stress, yes.

6334 x Q. 145. How about words ending in "our"? A. Well, I think you will find they are practically in the—what are you talking about now, the new Webster Illustrated?

6335 x Q. 146. The question is, would it be Websterian, to use your word, for a dictionary to spell some words of the class of "honor" with a final "our," and other words of the same class with the final "or," omitting the "u"? A. It might be, especially the word "Saviour," in which I find that the Webster's change shocked people. They still think of the sanctity of the word somehow as impaired by using the "or" spelling. There are not very many—you would not find enough to invalidate the general contention that all is Websterian in that book.

6336 x Q. 147. You will, however, find some words spelled in the defendant's Webster's New Century Dictionary and Webster's New Standard Dictionary in the manner rejected by Webster? A. Some few, yes.

x Q. 148. And you will find other words of the same class?

MR. CARROLL: He has not finished. Please go on.

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6337

THE WITNESS: Some few, but really not enough to notice, except if one is very hypercritical.

x Q. 149. You will also find other words of the same class in which Webster's change has been adopted and followed? A. Yes; that is the majority of them, the greater majority.

x Q. 150. You have spoken in proportions. Can you give any estimate in numbers of the words in which they were departures from Webster's Standard spelling? A. No, I could not do that; I could not give you anything that is really statistical about it except to say that the great majority of words ending in "our" in English, in this dictionary end with "or," they follow Webster's rule, and the exceptions are quite exceptional.

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x Q. 151. Taking words of all classes to which Webster specifically referred in his introduction in which he adopted a uniform rule in his dictionary including words ending in "our" words with the "ll" before a final syllable, words ending in "re," and other classes of words to which Webster specifically refers, how many departures in your opinion would be permissible in this dictionary without forfeiting the right to call it a Websterian Dictionary? A. Well, that is a personal opinion. I should say ten per cent.

6339

x Q. 152. In other words, they might depart in ten per cent of the cases from Webster's spelling— A. (Interposing.) And still remain Websterian, yes.

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x Q. 153. Notwithstanding they violated the rule of consistency in spelling words of the same class to which Webster specifically referred? A. Yes, but then Webster himself has not followed that out absolutely; you will find, in the 1847 work

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some words ending in "er" spelling with "re."
I was thinking now what Webster did himself.

MR. CARROLL: Had you finished, Dr. Peck?

6342

THE WITNESS: I have not finished, but perhaps it was not relevant. I wanted to go on to say that I doubt whether you will find absolute consistency in any book that bears the name of Webster, but if you find so great a degree of consistency as to make it perfectly plain that there was a standard and that these are mere slips, I don't think that has any bearing on the case at all.

6343

x Q. 154. How could such a slip occur if the book was based upon or abridged from Webster's Dictionary itself? A. Well, it might occur. Unfortunately the proof readers are not always immune from prejudice or error or desire to change. I have found that to my sorrow very often, and they will put in a certain form of spelling, and it will even pass through the hands of the chief proof reader in a manner that the editor of the book would not approve of. I have had a great deal of sorrow in that direction.

6344

x Q. 155. Do you explain the departures from the spelling adopted in Webster's Dictionary of 1847 which occur in the defendant's dictionary to slips on the part of the proof readers? A. I should say that was the most probable explanation. Of course, I had nothing to do with making the books or with passing the book through the press, but in passing the other book, the Webster book, through the press I find that unfortunately the chief proof reader was an Englishman, or what is next door, a Scotchman, and he had a fondness for "our" and I had a fondness myself for "our." I

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was not trying at that moment to introduce "our." I was trying to keep it out; but between us I think there were some slips that passed his eye, and that were very grateful to mine. I perhaps did not see them. I don't think there were enough of those to base any argument on at all.

x Q. 156. You don't know how many of them there were, though, that used "our" instead of "or"? A. No.

6346

x Q. 157. At the time Noah Webster prepared his dictionary and introduced his ideas of spelling, was there any variation between English and American usage in that respect? A. In any class of words?

x Q. 158. In any class of words? A. Well, no, they had used in England at times the "or" spelling in certain words. Those that had been long in England and lost their French origin; and as to the "ll" there was a difference of opinion somewhat. That is why Webster was received in a way more easily than he otherwise would have been, but you may say practically the English usage was one and the same except where they spelled entirely wrong out of ignorance, and that was very often the case.

6347

x Q. 159. Was not the "our," and is it not to-day, a distinctive spelling of words of the class of "honor" and "labor"? A. In England, yes.

x Q. 160. That is the distinctive English form of spelling that class of words, is it not? A. Yes. The reason is, however, because most of those words came into English through the French under the form in "eur"; for instance, "honneur." They treated them as though they had come directly from the Latin "honor," whereas that was not so.

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x Q. 161. Is it not distinctively an English form of spelling to use the double "l" in such words as "jeweler," "traveler" and the like? A. "Jeweler" is double "l," yes.

x Q. 162. "Traveller"? A. Yes.

x Q. 163. And other words of that class? A. Yes.

6350

x Q. 164. What is the American form? A. The American form is one "l," and in England in the word "jewelry" they put in an extra "e."

x Q. 165. Is it not a distinctive English form to use the final "re" in such words as "center," "theater" and the like? A. Yes.

x Q. 166. And is not the distinctive American form "er"? A. Now, yes. Well, I am not sure; I would not say that about "center." That question of "re," I think as many people spell in "re" as they do in "er."

6351

x Q. 167. But generally words of that class the English form is "re" and the American form "er"? A. Well, no. I think the upper classes in England spell in "re." And a great many other people spell in "er." In fact, I know that is so from observation.

6352

x Q. 168. And is it not true that Webster was primarily the cause of the adoption and fixing of the American usage in the several classes of words referred to? A. Yes, but not through his dictionary; through his spelling books, of which there must have been some ten in England.

x Q. 169. And that spelling was also adopted and used in his dictionary? A. It was used in his dictionary.

x Q. 170. And insisted upon by him in his introduction— A. (Interposing) I must ask to have the answer fully given. That is to say, Web-

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ster might have done a thousand things that had nothing to do with his dictionary. Now, his spelling book circulated to the extent, I am told, of seven or eight million. That was in every school all over the country for years and years and years. I remember it myself. That was in everybody's hands. That is what did it; not the dictionary. The dictionary had no special influence except as supplementing in a way the work of the spelling book. You see, his dictionary circulated in England, because they said, "Oh, well, never mind. This is a good dictionary. We don't mind this barbarous American spelling." It never took hold. Why did it take hold in the United States? Not from the dictionary, but from the spelling book.

6354

MR. HALE: The concluding portion of the witness's answer is objected to as irresponsible and argumentative and motion is made to strike it out.

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x Q. 171. There is, however, at the present time in numerous words a difference between English and American usage, is there not? A. Yes, both in spelling and usage, of course, grammatically and otherwise.

x Q. 172. Which usage does defendant's dictionary follow, the American or English usage? A. The American usage.

6356

x Q. 173. Uniformly? A. Well, unless there may be a few slips. There again I say it is possible that some few English spellings crept in; in other words that is the standard of the book obviously.

x Q. 174. Even where the spelling followed in the books is diametrically opposite to the spell-

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ing specifically advocated in Webster's Dictionary? A. I did not say that.

6358

x Q. 175. Well, I ask you, is that true? A. I say that this book is Websterian, or that that book is of the nature of Webster's book, because its standard is the standard set by Webster, and if there are any variances on Webster's spelling it is either due to the carelessness of the proof reader or somebody's negligence. It is not intentional and is not to be considered, because that can be taken out in a revision. I don't think it is important. I don't think it occurs often enough really for you to make a point of if you were to go to work to count it.

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x Q. 186. But you don't know how often it occurs? A. I don't know how often it occurs, but I say you get an impression reading through a book, which is a safe impression,—if it had occurred very often, or if it occurred even frequently, or semi-often, it would have made an impression on me, it would have made a great deal more impression on me, because it has not occurred; once in a while I would see it.

6360

x Q. 187. You have suggested that the departures from the Webster's dictionary might have been due to slips in proof reading, or other like accidents. Might it not also be due to the fact that defendant's book was in truth based upon an English dictionary? A. Well, I don't know that fact in the first place; in the second place, I am sure it was not intentional, and then your theory is just a theory. I don't know; I cannot say about that, because I know nothing about any English connection that this book had. It is certainly extremely American in its vocabulary; more so than Webster.

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x Q. 188. Did you compare this book with any English book? A. I compared it with Stormonth. I did not want to compare it with any larger book, but Stormonth is a good every day kind of a book and I compared the vocabulary with that.

x Q. 189. What did you find in that comparison? A. And there is another English book—I am sorry I don't recollect the name of the author. I think it was Dr. Bond but I am not sure. That is another English book with which it was in part identical.

6362

x Q. 190. What is the name? A. I don't know. I think it was Bond. I can find out and put it in the final record if you want. In Stormonth I found he used the new English spelling and that defendant's Webster was based upon the American spelling.

x Q. 191. You found that the book was not based upon Stormonth or abridged from it? A. There were no signs of the book being abridged from Stormonth.

6363

x Q. 192. With what other English dictionaries did you compare defendant's book? A. I did not compare it with any.

x Q. 192. And with what other American dictionaries did you compare defendant's book, if any? A. There were two or three small dictionaries lying around, and while I made my regular comparison, as a strict comparison between this book, I mean to say the Webster's New Illustrated and the New Century, and the book the name of which I have forgotten when we were talking informally out here—the Reliable Webster. I compared it with that, although that is a smaller book, a very good book, and I thought that was about enough. It is not as though I was comparing two great unabridged works, for instance, the Standard and the Century, or something like that.

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x Q. 194. You did not compare defendant's book with all dictionaries to which you might obtain access with a view of finding out which book it was really based upon or abridged from, did you? A. There were other books, there were books edited by a Mr. Roe, and there was a book edited by Mr. Thomas H. Russell. I took them all, and they all went back to the Webster's 1847 as far as I could make out.

6366

x Q. 195. I would like to know—A. (Interposing) Only the Webster's New Illustrated had a great deal more modern vocabulary than any of the others.

MR. HALE: The last answer is objected to as not responsive and motion is made to strike it out.

THE WITNESS: It is describing what I found in my comparison.

6367

x Q. 196. The question is not what you found; I want to know with what books you actually compared defendant's book with a view to ascertaining the precise book upon which it was based or from which it was abridged? A. I have answered that there were at least six books.

6368

x Q. 197. Now, please name them? A. Well, in the first place, there was a Webster's New Illustrated—you mean with which I compared the new Webster's New Illustrated?

x Q. 198. Yes? A. I compared it with each book of Cupples & Leon which we had before us and Webster's New Century.

x Q. 199. And found them practically identical? A. Practially identical, and the book called the Saalfeld Reliable Webster, published by the Saalfeld Company, and I compared them with

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two books of which the exact titles have escaped me.

x Q. 200. Can you describe them? A. A. I can describe them; one by Mr. T. H. Russell. I don't know him. And another by Mr. Roe. I don't remember his initials, but you do, because you know him. Just as I compared it with Bond in the English book.

x Q. 201. Is there any other English book besides the one designated by the name of Bond with which you compared defendant's book? A. No. I was not looking at it for that purpose. 6370

x Q. 202. With what purpose were you looking at it? A. To see how it compared with the general run of small dictionaries. I must confess I have not had any great experience with small abridged editions, and I had to hunt up a great many dictionaries and study them pretty carefully and had them read to me and I compared this Webster's New Illustrated until I had formed an opinion, and I went over a great deal more on special points and special words and special classes of words and so on. Some of them, for example, went like this: They would leave out all the negatives because they say you can supply the negatives from the positives, and all such things as that. I wanted to find out how these books stood and what they were like. 6371

x Q. 203. The principal book with which you compared it was Webster's Dictionary of 1847; is that correct? A. That is quite correct, because it seems to me they all went back to that. 6372

x Q. 204. The purpose of your comparison and investigation was to determine the literary origin of this book, was it not? A. Yes.

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x Q. 205. And you began with Webster's 1847?
 A. I did not begin with Webster's 1847; I began with the small books. I noticed a great similarity all through. Then I thought to myself, what would they naturally go to if they went to a large unabridged lexicon, something that was not copyrighted at the present time, was out of copyright, and looking over the Webster's 1828 it seemed to me they had copied a good deal there, but when
 6374 I got to the 1847 it seemed as though they had copied more fluently, more volubly, more extensively, and so I settled on that, because in 1864 you can show a great many coincidences, but they are coincidences with the 1847, and so it brings you back to the 1847.

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x Q. 206. When you began this comparison did you know the purpose for which it was to be used? A. You mean the Webster's New Unabridged—you mean the Websterian?

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x Q. 207. When you began the comparison of Webster's New Standard Dictionary with other dictionaries did you know the purpose— A. (Interposing.) I knew it was the purpose of the Syndicate Publishing House to ask me in case my investigations and my reports were satisfactory. I did not know what they expected me to report. I made my investigation quite independently. I knew that they probably—in fact, I knew—that they intended to ask me to prepare a small dictionary to take the place of the one that they were using.

x Q. 208. Did you not know as a matter of fact that this comparison of the defendant's book with Webster's 1847 was desired for the purpose of showing that it was founded upon that book? A. No; I did not.

x Q. 209. You had no suspicion of that? A. Nothing was said to me about Webster 1847. I took some weeks, and did not even go down to the office of the Syndicate. I went up to my own library, where I had my own dictionaries, and did most of my comparison there. Sometimes I went over to the Columbia University Library for a rare book, and it took me a good deal of time. If they had told me that, it would have saved me a great deal of trouble.

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x Q. 210. After you got around to the Webster 1847 and made your comparison, did you then cease other search for the origin of defendant's book? A. Yes. It seemed to me convincing that that was the origin, because all the other books that I found post-dated Webster's 1847. It looked very much as though they had used the same material, and perhaps in some cases they had copied from one another or even used the same plates. That was not precisely what I had in mind. I had in mind the desire or intention of making a new small dictionary, and as to any controversies about the origin of these books, that was not the thing that came to me at all at first. It was to determine what sort of books were salable and were liked by the schools and children and young people in shops and offices and so forth, and I went through them all in that way, first comparing these to see how like they were to this or this was like them. There was no discussion of the source or the origin at all in my mind. That came to me afterwards when I noticed the same similarity that occurred between certain books.

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x Q. 211. You made an affidavit which was used upon the motion for preliminary injunction in

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this case, did you not? A. Yes. Of course I don't know about how it was used or when it was used and so forth. I made an affidavit. I don't know anything about anything else.

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x Q. 212. And in that affidavit you advocated the view that defendant's Webster's New Standard or Webster's New Illustrated Dictionary was based upon or abridged from Webster's Dictionary of 1847? A. I did. That is what I believed to be true, and what I still believe to be true, because I have not discovered any English book of earlier date that would make me think that it was the source.

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x Q. 213. The Mr. Roe whose dictionary you said you examined was the gentleman named on the title page of a dictionary published by the Chicago house of Laird & Lee; does that refresh your recollection? A. That refreshes it exactly. That is the man.

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x Q. 214. And was their dictionary also called Webster's New Standard Dictionary? A. The title I don't remember; it was called Webster's something or other.

x Q. 215. Was the Mr. Russell to whom you have referred the gentleman named upon the title page of the dictionary published by Saalfield? A. Yes, that was the one. I gave you the title of that I think, the Reliable Webster. That was a book smaller than anyone of these. That was one of the almost children's dictionaries, but very good. I have been told since that Mr. Russell has a reputation as a maker of lexicons, dictionaries and so forth.

x Q. 216. Are you acquainted with the reputation of Mr. Roe as a lexicographer? A. No, I don't say that. I don't know anything about

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Mr. Roe at all. He was a man who was a lexicographer.

x Q. 217. Do you know what lexicons he has compiled? A. Only the one that I saw.

x Q. 218. He has compiled no other famous authoritative work? A. Except that.

x Q. 219. Do you regard that as a famous authoritative work? A. I certainly should not say it was famous, but it is a book that has been very widely circulated and that is quite accurate.

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x Q. 220. Did Dr. Noah Webster insist upon the necessity of an American Dictionary as distinguished from an English Dictionary for use in this country? A. His title to his dictionary in 1828 showed that. That is "An American Dictionary of the English language." He held that the two nations had practically developed somewhat different varieties of the same speech, and for this country he made a different sort of lexicon. It is the same old thing Brander Matthews has been handling for a great number of years. Webster has in his introduction in 1828 one or two points there, one is that Americanisms, so called, he has included, though he finds that their source is usually the other side of the water. That was taken up long after by Richard Grant White, and it has been retaken up by Brander Matthews, but it was originally noted by Noah Webster, and the whole theory of that is that Webster held that the two languages had grown apart, because he says there were English words that sound like Lapland words to an American.

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x Q. 221. Was that one of the reasons alluded to by Webster as necessitating an American Dictionary as distinguished from an English Dictionary, the difference in the form of government,

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different laws, institutions, customs and the like?

A. Well, in so far as those differences would affect the vocabulary. In fact, that is what he says here, "he feels obliged to introduce information about England for the gentlemen of the law." Nobody else would know anything about it.

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x Q. 222. Did he not also refer to the necessity of difference in definitions in certain terms which were used differently in England than in this country? A. Yes.

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x Q. 223. I presume that would apply to ecclesiastical terms, very largely, would it not? A. Yes; that is perfectly true—very largely. He gives a great many ecclesiastical terms, but explains that they are English, and also law terms. We have had that. And terms that relate to land tenure, questions of feudal law, of remnants, of feudalism and also matters of rank. In other words, whole masses of words that we don't use in this country ourselves, although we may read them.

x Q. 224. Or in which we use them in a slightly different sense? A. We use them in a different sense, like "sheriff" for example, we say a sheriff is a very petty officer in a way; in England he is a great man.

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x Q. 225. You do not claim I presume that the new matter added to defendant's Webster's New Standard or New Illustrated Dictionary, and which was not contained and could not have been derived from the 1847 edition of Webster's Dictionary makes the defendant's book a Webster dictionary? A. Yes, it continues the Websterian tradition, because Webster is very radical, you might say, and very wise, and his advice has been

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followed by later lexicographers. That is, to put in the current common every-day words people want to use, not so much technicalities, and therefore the new words that have been added to what was perhaps nothing but 1847 Webster—that is, they got the residue, the back-bone of the 1847 Webster and filled it up with words that have come into the language since, either to represent new things, or because the meanings have been changed.

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x Q. 226. The opinion you have expressed then that defendant's book is properly termed a Webster's dictionary is in part based upon contents which were not taken from any Webster's dictionary? A. Oh, yes, but were taken because Webster would have taken them, because he advised taking such words and advised the use, say, of vulgar words. This book is not alone in that.

x Q. 227. I presume other American dictionaries do the same thing? A. Not to such an extent.

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x Q. 228. Did Webster's principles as you understand them include the requirements that the dictionary should be scholarly? A. Yes, certainly.

x Q. 229. What were the Webster requirement in respect to definitions? A. The most beautiful thing that he said was that definitions ought to define, or in other words the definition ought to be more simple than the thing it refers to.

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x Q. 230. The accuracy of the definition was of course a prime essential? A. Of course that was the first thing. Even if like Johnson, you made the definition more complex than the primary word, you should be accurate, and next you should be clear.

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x Q. 231. In your opinion does the defendant's Webster New Standard dictionary conform to the requirement of accuracy and scholarship in respect to the information afforded? A. Yes. I should say that it is a defining dictionary. It is not an encyclopedic dictionary as Webster's was. When you make an encyclopedic dictionary you may spread yourself, and make things very clear, but these two books define and stop. They just crowd it down as close as possible, which is the reason why they contain a great many more words than the original Webster. As to the question of scholarship, as they are derived mostly from Webster, I should say they represent the same scale or standard of scholarship, or at least that the standard of scholarship is that of Webster, because they have taken it from Webster. The scholarship of the editor, I can't say anything about that, because I don't know. Webster could say a great deal more. In other words the definitions are Webster's definitions, and in a defining dictionary are essentially therefore as scholarly as his, being identical.

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x Q. 232. I presume scholarship has made great advances since Webster's day? A. Very great.

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x Q. 233. This dictionary purporting then to be published in the year 1911 is of the same grade of scholarship as prevailed in Noah Webster's day prior to 1843; is that what you mean to say? A. In respect to definitions. There is no question of etymology, you understand. It is an abridged book; it does not contain any etymology, where the greatest strides have been made, and Webster would not have had it so probably, and in definitions it has been altered from Webster, where the meaning has changed since Webster's time.

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x Q. 234. Is it your deliberate opinion that this book of the defendant's is a book of high scholarship and great accuracy? A. I don't think I can answer that yes or no. I would rather answer not categorically, if you will allow me, because I think I have answered it already. These two books represent precisely the standard of scholarship that Webster represented in 1847, and with the addition of a great many words to the vocabulary which do not involve as a rule questions of scholarship because there is no etymology in the book, but merely definitions. I don't think you bring in the question of scholarship much on the question of definitions. They take Webster's definitions. Take to-day the latest Webster you have, the New International, probably that has a great deal of matter or a great many definitions that were taken from Webster that go back ever so far. There is no reason for changing them. The definitions are just as good as they could be. The same way with these books. They have taken the best definitions that Webster gave. Now, when they came to new words, I think their definitions have been pretty good, quite as good as Stormonth's or Cassell's.

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x Q. 235. Do you know of any instance in this book where English definitions have been given in preference to American definitions of the same word? A. In the case of military terms, I have noticed such; I would not be able to give an example because it may have been changed; but military and naval terms are sometimes English for the reason that they were English in this country until the Civil War perhaps, or after.

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x Q. 236. How were they in Webster's 1847? A. They were, as it were, English there except in

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some cases where he gives it as English and changes, but in our army and navy the changes of vocabulary, the vocabulary of the art of war, remain pretty close to the English. I don't think until the Civil War, and even after, they have changed, even in the last few months some things, or in the last year or two, like changing midshipmen and cadets and so forth. There are some English definitions there.

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x Q. 237. Are there instances in the book of defendant's where English definitions are given instead of the American definitions given by the Webster's 1847 edition? A. Not to my knowledge.

x Q. 238. Are there any ecclesiastical terms defined in this book in accordance with the English definition instead of the American definition of Webster's 1847? A. Yes.

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x Q. 239. Are there any other classes of English definitions? A. I think it would be fair to let me explain that.

x Q. 240. You may explain? A. I say, yes, there are such instances, but the fault lies in not labelling them as specifically English, because we still read our Anthony Trollope's ecclesiastical English novels. That would come under Webster's head.

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x Q. 241. Are there any instances where the English definition is thus given and the American definition as contained in Webster's 1847 edition is not given or no American definition is given? A. Not to my knowledge.

x Q. 242. To the extent that this book gives English forms of spelling and English forms of definitions and omits the American forms given and advocated by Webster, you would not say this

book was Websterian? A. Yes, I would, because Webster himself says in one of his sixteen points that he has given a great many words that are locally English, or local in England, and quite unintelligible in this country, as much so as Lapland words, except to those people who read English books; so I think any word that is not very technical, any word you hear in conversation in England, and that is, a word used there, would be given here in any one of our dictionaries, and that is what Webster means. He says, "I have given words that are local in England, because some people in this country have read those books containing them," and for that reason it would not interfere with its Websterianism; it would be in fact one of the precepts of Webster.

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x Q. 243. You say it would be one of the precepts of Webster to give the English definition of a word and omit the American definition of the same word which was given in Webster? A. No, I did not say that.

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x Q. 244. That was the question? A. The question was, I thought, was it consistent with Websterianism to insert English words with the English meaning.

x Q. 245. No, that was not the question. I will repeat the question. To the extent that this book gives English forms of spelling and English forms of definition and does not give the accepted American forms of spelling and American forms of definition of those same words, which forms of spelling and forms of definitions are contained in and advocated by Webster's dictionary of the edition of 1847—now, to the extent that this book does that, would you term it Websterian? A. No.

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MR. CARROLL: I object to this question on the ground that it has not been shown that in a single instance words have been given English definitions and the American definition of the same word has been omitted; in fact, this witness has distinctly said that he does not remember any such instances.

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MR. HALE: The question is directed to ascertaining the full meaning of the word "Websterian" as used by this witness in testifying that the defendant's dictionary involved in this case is properly described by the term "Websterian" or "Webster's," which the witness says he uses synonymously.

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x Q. 246. So far as Webster differs from Johnson in his spelling and definitions does defendant's book follow Webster or Johnson? A. Webster.

x Q. 247. Invariably? A. As I say, invariably, yes, unless there may be three or four possible exceptions which I have not noted.

x Q. 248. So far as it follows Johnson if at all you would not call it Websterian then? A. Why, no. That is, if it were absolutely unlike Webster, it would not be Websterian. I am willing to admit that.

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x Q. 249. I presume it is generally admitted in the light of recent scholarship that Noah Webster's etymologies were substantially all wrong? A. Yes, they were practically all wrong, even when you come down to the Merriam Webster of 1864; even though Hadley had charge of it, and was a very accomplished scholar; they had not yet made the discovery of the two great things which revolutionized etymology; one was Verner's Law,

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which explained the exception's to Grimm's Law, which nobody had been able to explain, and second, the dissertations and discoveries on nasal consonants by Professor Brugmann.

x Q. 250. Have you made any comparison of defendant's books with other dictionaries with a view to ascertaining the source and origin of defendant's book since making your affidavit which has been referred to? A. I looked in Richardson, 1836.

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x Q. 251. Was that an English or an American edition? A. That is an American book, but I did not find anything there that helped me any. I had really made up my mind and I did not find any other books on sale or in use anywhere. Every time I saw a small dictionary, I bought it.

x Q. 252. Did you make any further comparison of defendant's book with the Webster's dictionary of 1847 since making that affidavit? A. Not with reference to that book, no. The affidavit was made and sworn to and I had nothing to add because I had really spent a great deal of time on it.

6419

x Q. 253. You have stated that you prefer the term "Websterian" to the term "Webster's" as descriptive of the defendant's dictionary. Why? A. Well, largely for a reason that is not very cogent. It is because I prefer an adjective to a noun. It is more euphonious. As I said this morning, I would say "Wagnerian" rather than "Wagner's" and I would say "Byronic" rather than "Byron's" and I would say "Tolstoian" rather than "Tolstoi's," and so on. I think the adjective is the better word, the neater word, than the other title.

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x Q. 254. Any other reason? A. No other reason.

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x Q. 255. Do you think it more accurately descriptive of the literary contents of the book? A. Why, I think possibly any one would say it for that reason. It is a descriptive word, whereas "Webster's" is not so descriptive a word.

x Q. 256. You have also stated that the word "Webster's" comprehends most dictionaries with the multitude? A. Yes.

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x Q. 257. And that the phrase "Give me a Webster's dictionary" means no more than "Give me a dictionary"? A. Well, I think people generally say—

x Q. 258. Wait a minute, until I put the question. What is the reason for that statement? A. Well, I think I said, "Give me a Webster's" is the phrase,—that Webster has got to mean a dictionary nowadays with most people.

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x Q. 259. How and why? A. Because it has been so largely advertised as a dictionary in general use and it is therefore more before the public mind and among teachers and so on, whereas they may be actually using the new standard or the old standard or some other abridgement, Worcester—I think Webster really means to the public mind a dictionary, but when you say "Give me a Webster's dictionary" I presume the clerk would bring you out any dictionary that was called "Webster's dictionary"; he would not differentiate between one or another; he would bring out all he had.

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He would bring out two or three dictionaries. He would not discriminate in your favor, I mean in favor of the Merriams, unless of course he knew his customer and thought he would like to sell a ten or twelve dollar book.

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MR. HALE: So much of the answer as begins with the phrase "whereas they may be actually" and so forth is objected to as not responsive and as a volunteered statement of the witness not based upon any facts of which he has been shown to have knowledge, and motion is made to strike it out as a mere conclusion and as not responsive.

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x Q. 261. You have stated that the defendant's dictionary follows fifteen out of the sixteen principles of Noah Webster which you have enumerated. Do you wish that answer to stand without any qualifications.

MR. CARROLL: Objected to inasmuch as the witness has already qualified that statement, and inasmuch as his testimony on direct examination fully answered his whole position in that regard. 6427

A. No, I don't care to qualify it for the reason that as Mr. Carroll says I made a qualification before.

x Q. 262. What was that qualification?

MR. CARROLL: Objected to as the record speaks for itself.

MR. HALE: This is cross examination.

THE WITNESS: That was not what I meant; I made one qualification about etymology, that the small book did not have etymology. Webster probably did not express it, so it came down to fifteen points in an abridged, and then I made another semi-qualification with regards to military terms and so forth. You have that down on the 6428

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record. But I have no other qualification to make, and I think those were sufficient at the time.

x Q. 263. And your opinion that the book is properly called "Websterian" or "Webster's" is based upon the assumption that the book in truth does follow fifteen out of sixteen principles with the qualifications which you have stated? A. Yes.

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x Q. 264. Do you mean to assert as a result of your investigations that there are any words or definitions which were actually copied or abridged from the 1847 edition of Webster's dictionary? A. Do I assert that there were actually copied—

x Q. 265. Or abridged? A. Yes; that no person with a fair open mind could read the continual repetition which you find in here of the Webster 1847, paragraph after paragraph and page after page, without being absolutely sure that it came from the Webster's 1847.

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x Q. 266. You base your opinion upon the identities and similarities which you found by your comparison? A. Found in all these books by my comparison, yes.

x Q. 267. And of course that is said on the basis of that comparison? A. I have not been able to find and nobody has been able to find and anybody who could give any evidence or any opinion, who could be expected to have any knowledge of any other source than the 1847 Webster.

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x Q. 268. Do you mean to assert that the compiler of the defendant's dictionary, whoever he may be, had before him at the time he was preparing the dictionary, the 1847 edition of Webster's? A. I don't mean to assert it; I mean to say that the circumstantial evidence is so very

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strong that in default of other testimony one would have to accept that.

x Q. 269. In other words you express the opinion that that fact is true based upon your comparison and investigation? A. I express it very strongly, yes. I don't go any further than that, because it is conceivable, of course, that you had another source, that somebody else compiled it from Webster, but that it came from Webster is absolutely certain in my mind. I would be willing to assert that and swear to that. It is a demonstration. It is like two and two are four.

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x Q. 270. If it should be shown that the book more nearly conformed to some other dictionary than 1847 and contained vastly more identity and similarity with this other dictionary than it does with the 1847 edition of Webster's dictionary, would that affect your opinion in any degree? A. It is a matter I should want to consider after seeing the testimony, reading the book in question, because someone might take the books under discussion and go back to the '47 and make it more Websterian than it is; that would be possible. It would prove that it was not directly from the Webster 1847. You only change the time. Now, you could make up, if you wanted to, you could send somebody or get somebody from a set of people, compilers to make a new dictionary out of the 1847 which would be so close to it that it would be the same thing almost, then you would bring it to me and say, "Well, now, doesn't this show this was the original source of these books," although it was really made perhaps yesterday or printed yesterday, come off the press yesterday. Of course I would not say so. I would say, this is nearer, this is more Websterian. It may be

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older than these books we have, but that would have to be proved. I think anybody interested very much in this question and willing to spend a good sum of money about it, might do that very thing, might compose and invent out of the 1847 Webster, a dictionary which would be much more close to that 1847 edition and that would also have a large supply of modern words. That is, make it over. I can conceive of such a thing as that. So, if you ask me if anybody brought me a book of that kind at first glance, I look at it and say it is more Websterian probably; I would not necessarily say that these books came from it. I would say that it might have been made for the very purpose of refuting and getting me to say that thing. I should want to know when it was printed and where it was printed, and I should want to have all the documents and data in the case, because I would stake my reputation on the source of these two books, and I would not like to give my opinion, which is not lightly arrived at, without a chance to know what this new monster was, whether it was a book older than these or something that was made within the last six months.

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x Q. 271. Your opinion though is based solely upon the identities and similarities and the number of them which you found by this comparison?
A. Yes.

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x Q. 272. Is this Exhibit C which consists of marked and pasted sheets taken from the dictionaries compared a perfectly fair sample of what you found in your comparison? A. Absolutely so. I would be willing to let you choose any given number taken at random and let me mark them.

x Q. 273. And you found nothing which would make a better showing for the defendant than

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those pages? A. No, I could not ask anything better than that.

x Q. 274. You are willing to risk your opinion upon the identities and similarities pointed out by the markings on those pages? A. Yes. I did not go through the whole book examining the pages, to see which ones contained the greater number of similarities, and likenesses. I took any number just as I came to them and examined them afterwards and used them. I went over and read a great many other pages, however, having someone to read to me and let me examine, and I found it all ran about the same.

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x Q. 275. In your summary statement of the so called sixteen principles of dictionary making, by Noah Webster, you have referred to his principles governing orthography or spelling simply as follows: "In the orthography of certain classes of words, I have aimed at uniformity, but I have not proceeded so far as my own wishes might dictate." Did Noah Webster explain his ideas and practise as to orthography in the introduction to his dictionary, and I call your attention to pages LVII to LX inclusive in Webster's Introduction, which has been offered in evidence as Complainant's Exhibit B, with Harry Thurston Peck's affidavit? A. Yes. All that I should be quite willing to take up with anybody, but I think the answer would be "yes."

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x Q. 276. Is the statement there made in Noah Webster's introduction an accurate statement of the principles governing the spelling in Webster's dictionary of 1828 and 1847? A. Why, they are accurate, yes, so far as representing his view is concerned; I don't say all his discussion there is accurate. They represent what he thought; they are Websterian.

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x Q. 277. In other words, they represent the Websterian theory of spelling? A. Yes.

x Q. 278. And in the numbered paragraphs in that portion of his introduction he has grouped various classes of words and expressed definite ideas as to the proper manner in which those words should be spelled in a dictionary?

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MR. CARROLL: I object to all this line of testimony on the ground that the exhibit speaks for itself, and counsel for complainant is obviously trying to use this witness to erect sign posts through the printed exhibit.

A. Well, when you ask me is this accurate—did you say?

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x Q. 279. Read the question. (Question read). In other words, has indicated the Websterian method of spelling those words? A. I am absolutely at variance myself personally. I am not with Webster at all. I think he has outraged the language, but he has indicated here—

x Q. 280. I am not asking you to sanction it? A. I know, but you rather put it in that way, whether I would consider it correct.

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x Q. 281. I want to know whether it is Websterian; that is all? A. Oh, yes, Websterian. There is something I might add to that, in the case of a word derived from a foreign language, one has his choice always of copying the original pronunciation or the foreign pronunciation, because he considers it has not yet been Anglicized or by using the Anglicized pronunciation, there is that question which Websterians might differ about, as to whether who is right.

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x Q. 282. So far as Webster's spelling has persisted and become now the standard form and good usage in this country, does defendant's book adopt and follow it? A. Yes, deriving it, however, not from Webster's lexicons and the dictionary, but from spelling books as other people have; that is to say there is an intimation that Webster's dictionary has affected the whole orthographic system of the country. Now, I say Webster's spelling books do. I am willing to admit that, and I am willing to admit that the defendant's book in following it follows Webster, but not Webster's dictionary; I mean, not because of Webster's dictionary. I think that is a negligible factor.

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x Q. 283. So far as defendant's book varies from Webster's form of spelling, which form has persisted to this day and become good American usage, would you term defendant's book Websterian or Webster's?

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MR. CARROLL: I object to that on the ground it has not been shown defendant's book differs in any way from the original Webster in spelling.

MR. HALE: Both books have been offered in evidence, so it has been shown precisely to what extent defendant's form of spelling differs from Webster's form.

MR. CARROLL: If it does differ that will appear, but it has not been shown that there is any difference.

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A. A large variation from Webster or a great many variations from Webster would limit and diminish its Websterianism in any one of these two books we are discussing; an occasional varia-

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tion I should say would be negligible. That does not count. I should say it counted no more than any misprint, or minor error. I don't think it gives any ground to draw upon. You must deal with large things in a large way. If you find the book to be quite inconsistent with Webster, it is not Websterian. If you find it is ninety per cent. Websterian, it is Websterian. Now, I am willing to grant you the other ten or five per cent or whatever it is, but then that does not affect the whole book. You would apparently say here if there is just one word that is not spelled according to Webster, to that extent I say that would not affect the Websterianism of the book. It is not big enough.

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x Q. 284. Such variations, however many there may be, are not, however, Websterian in your sense of that term? A. No, as they are not Webster's usage they are not Websterian.

x Q. 285. I suppose the Standard dictionary and the Century dictionary also spell words in accordance with present usage which has persisted from the time Webster introduced the form of spelling; is that correct? A. Different from Webster; that is, Webster is not so radical as the editors of the Standard and the Century. While they are as radical as he is, he is not as radical as they are.

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x Q. 286. You do not deny that the Century dictionary and the Standard dictionaries and other modern American dictionaries spell words in accordance with the Websterian approved form which has persisted and become present day good usage, do you? A. That is to say they have accepted so much of Webster's innovations as the country accepted, yes.

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x 287. Does that make those books Websterian in your sense of the term? A. No, only as you would say to the extent that they have done in that in that small point, in that point at any rate they have been Websterian, but it does not follow,—there may be a thousand other things that overwhelm that and make it of no consequence, and as a matter of fact, we don't know how far Webster would have liked to go. He says he would like to have gone further, but whether he would have gone as far as the Century dictionary or Standard we cannot tell. All we derive from your question is that to a certain extent they are Websterian.

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x Q. 288. Are you using the Websterian in a broader sense than according to the principles and practise as exemplified in the 1847 edition of Webster's dictionary? A. Well, I was using it more—I was going back to the fountain head, the original Webster of 1828.

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x Q. 289. In your view then, anything that you deem Webster would have done in accordance with the principles you have stated is to-day Websterian and authorized anyone to call a dictionary Websterian? A. No, not at all. I don't go upon the basis of what he might have thought or might have said or might have done, but only what he said might be done and what he authorized to be done, and what he himself did in his later editions.

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x Q. 290. And you don't limit it to what he actually did in the 1847 edition? A. Well, in the first place, for example, I would put in a great many new words that he never heard of, representing things he had never heard of, but that is according to one of his rules where he says new

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words for new things; that is Websterian because he says that in so many words, but if you say because he spelled as he did, that is, he broke with the authorized English spelling, therefore you may also break a great many other rules, and depart still more from standard English than I say they had not any authority for that in Webster. Therefore the Standard dictionary to my mind and the Century dictionary to my mind are not Websterian in the changes they have made, they have gone beyond the wise conservatism of Webster. Webster stopped at what he thought was just and wise and suitable, and he did not let his own personal preference guide him in this matter. He says, "I should like to go further, but I think it best not to." And that is just what I would say.

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x Q. 291. In your direct testimony you have said that certain definitions in this book which you compared with the 1847 edition of Webster's dictionary were abridged from the definitions in Webster's 1847 edition. What precisely did you mean by the word "abridged?" A. I meant where you had a paragraph of some five sentences—I can give you an example if you will let me have that book.

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x Q. 292. Please explain your meaning first and then illustrate by example afterwards? A. Well, I should say if you have a paragraph of four or five sentences, containing certain marked leading words, that are condensed by the editor of one of these books into a single sentence, or at any rate something much less in length than the paragraph, containing, however, those leading words. I will show you if I can find you an instance.

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x Q. 293. Do you mean giving also the sense of the original definition? A. Yes. That is the upright line at the side.

x Q. 294. Before you give the illustration let us clear it up, and you can illustrate both at once. And you have also used the word "paraphrase." What precisely did you mean by the word "paraphrase" in that testimony? A. I meant by that the expression of the same thought, and not a common usage of that, in very much less words than were used in the original 1847 book.

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x Q. 295. Both the words "paraphrase" and "abridge" as used by you then to imply that there was an original? A. Yes, the difference between the two being that in a paraphrase there is no verbal similarity but a very close similarity in thought in a separate paragraph by itself; whereas the other word that I used which was "abridged," there the words are taken from the original and a shorter sentence or a shorter paragraph is made out of the very words.

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x Q. 296. And in your markings of this Exhibit C, instances of this use of the term "paraphrase" and the term "abridged" is indicated by a blue upright mark in the margin of the exhibit? A. Yes. I ought to say, let me add, probably very often the paragraph in Webster will consist of a number of synonyms strung along together. Now, it may be to the extent of fifteen lines. The man who abridged it, the editor, goes over that and throws out about half, because he thinks he has got enough, and saves that much space. Then he sometimes changes the synonym for another word.

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x Q. 297. Have you in the exhibit— A. This was an example. This was the kind I just men-

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tioned where it is lengthy and not a consecutive sentence, but it is sort of a paragraph. There a number of descriptive words are heaped up together. Under that word "action" you will find everything in blue is found precisely in "action" in Webster of 1847.

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x Q. 298. In this Exhibit C are there any instances which you have marked with the upright blue line in the margin which is not an instance of abridgement or paraphrase of matter in the 1847 edition of Webster's dictionary with which you say you have compared it? A. No, I think I may safely say not.

x Q. 299. Did you do this work personally? A. Yes.

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x Q. 300. Is this marking your own? A. I marked them. However, I would say it was revised and gone over again by the person who pasted it to see that it was right, but they are supposed to be a copy of mine. I wanted a nice looking sheet.

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x Q. 301. If there is any sense of a term given in the defendant's dictionary, which is not given in the 1847 edition of Webster's dictionary, you would not say that the defendant's definition giving that sense was copied, abridged, or paraphrased from Webster's 1847 edition? A. Yes, it might, for this reason: You will find in my affidavit there, sometimes the editor of one of these books or both of them, instead of giving under a certain title the definition of the Webster 1847 gives a part of the definition of the Webster 1847 and supplemented it with something a little up or a little below the word that was practically synonymous. That is, he mingled, say, one word Webster has given two sets of definitions. This

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editor has and did in many cases take out a part of each of "Webster's," and put them together.

x Q. 302. But in every instance, the sense was found in Webster's 1847 edition? A. Yes, such is my belief.

x Q. 303. Are there any cases of sense given in Webster's 1847 edition which you have marked as a paraphrase or an abridgement by means of a vertical blue mark in the margin which is not contained at all in the corresponding definition in the defendant's book? A. That could be accounted for only on the basis of a slip of the pencil or something of that sort. There might be one or two cases. We are all human. I would say no, no is the answer; it would not be invalidated by the occurrence of one or two such things.

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x Q. 304. In Defendant's Exhibit C, to your affidavit, I notice you have marked with a vertical blue line in the margin the entire definition of the word "adhesion" as contained in Webster's dictionary of 1847. I find that definition to consist of four paragraphs giving different meanings of the term in addition to the meaning, "the act or state of sticking." In defendant's dictionary as shown by this same exhibit I find that the word "adhesion" is defined simply as "the state or act of adhering." I show you the exhibit. How do you defend marking the Webster definition as showing a paraphrase or abridgement? A. No, Mr. Hale, that is not to be defended at all; that is an absolute slip of the pencil, because what follows is not "Webster's" even, it is only a translation.

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x Q. 305. That particular marking indicating an abridgement or paraphrase should therefore be corrected and omitted? A. Corrected and omitted.

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x Q. 306. And the full extent of the similarity or identity is the underscored phrase "the act or state of sticking"? A. Yes.

x Q. 307. I call your attention to the next word—

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MR. CARROLL: I object to all this line of testimony on the ground that the exhibit itself speaks for itself and that all the particular attentions which are being called are quite immaterial and irrelevant and the Court can discover for itself whether or not the markings are correct.

MR. HALE: The question goes to the good faith and accuracy of the marking of this exhibit which has been presented to the Court as reliable.

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If accident or other reason has rendered the same unreliable, complainant is entitled to show it by this witness, especially as he has based his testimony that defendant's dictionary is properly called a Webster's dictionary upon this exhibit.

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x Q. 308. I call your attention to the next word in Webster's 1847 edition, which is the word "adhesive," and which definition contains four paragraphs, all of which have been marked with a vertical line indicating that they have been abridged or paraphrased in defendant's dictionary with which you compare them. I find the word "adhesive" defined in defendant's dictionary simply as "holding fast"; "gummed for use"; "sticky," with no other meanings given. How do you defend marking all of the meanings given by Webster as having been paraphrased or abridged and carried into defendant's dictionary? A. Well, I

should say that this came under the head of what I mentioned a while ago. There are three things denoted by the upright line; one is that the under line shows that the words are absolutely taken from Webster. Then I told you that the upright line stood for a paraphrase or condensation, but that sometimes the editor went afield a little and took in neighboring words, as giving him the general ideas that are expressed in Webster, only different titles, titles that are very near or derived from the same verb. I can account for it only in that way. "Adhesive" alone as "holding fast, gummed for use, sticky," but Webster has put in there quite a number of other meanings which are essentially the same, however, and this is therefore an abridgement. That is, Webster has made a whole paragraph and this editor has made two lines. That is what I should call abridgement.

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x Q. 309. In your opinion the marking of this word "adhesive" in the Webster 1847 edition as a paraphrase or abridgment may be defended? A. It may be defended, yes, on the ground that it is a condensation of several things in Webster.

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x Q. 310. In this definition of adhesive in Webster I note a meaning given as follows: "Adhesive plaster, in medicine, sticking plaster, used especially for uniting the lips of wounds." Please point out that meaning in defendant's dictionary, showing where an abridgment of that meaning is contained? A. You must remember that Webster does not give there a title; he gives there an adjective and a noun or a participle and a noun; otherwise you might have a whole sentence and then explain what it meant; but what troubles you is about the united parts of a wound; is that it?

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x Q. 311. I want to find an abridgement of the language quoted. You have marked this as such and have asserted that defendant's dictionary contained an abridgement of that language. Please point it out? A. Well, I think "holding fast, gummed for use," there is not anything here that has to do with plaster. Webster puts in the adhesive plaster, not as a regular title, but he puts it in small type underneath.

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x Q. 312. Yes, and you have marked that language as an abridgement? A. Yes, that is an abridgement.

x Q. 313. Now, show where it is in defendant's book, please show us; justify that marking?

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MR. CARROLL: I object to this examination on the ground that this witness has already testified that a large part of Webster's work was what might be called encyclopedic which was necessarily omitted in an abridged dictionary.

MR. HALE: Complainant's counsel responds that that does not justify false marking, the marking of an exhibit intended to show that matter was in Webster's and abridged and paraphrased and inserted in defendant's book, of which this is a fair sample.

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MR. CARROLL: Counsel for defendant is willing to stand upon the exhibit and requests the Court to particularly look at it and it will appear upon its face whether counsel for complainant's absurd accusations are correct or not.

MR. HALE: If not false markings, which may be offensive and which I withdraw as

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unintentional, I mean incorrect and unreliable markings, which I will substitute.

THE WITNESS: No, I don't think it is unreliable marking. The marking here in the first place extends over more than one definition, if you notice.

x Q. 314. Doesn't that mean that all the matter to which the marking extends is abridged or paraphrased? A. There are five words here relating to adhesion and different kinds of adhesion and so forth. Webster puts in the encyclopedic paragraph, adhesive plaster. That is *aliunde* however, and when giving an upright mark one does not expect there to find the close actual repetition of words but the general idea which enters into the words of the other book. Now, that was put in and evidently marked here to cover the matter of adherence. Of course everybody knows what a plaster is. Now, adhesive is "holding fast," gummed for use, "sticky," and we have also marked "adhering" put adhering in, and sticky; that is anything which adheres, "follower of a party or leader"; all those things are vital and they are all essential because they cover the Webster definitions. Now, they represent paraphrases and condensations. I stand by that marking.

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x Q. 315. I repeat my last question. Does not the vertical blue mark in the margin indicate that all matter comprehended by it has been paraphrased or abridged and inserted in defendant's dictionary? A. Paraphrased or abridged or taken from some other article or title in Webster very near to that of the same character and same general meaning.

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x Q. 316. I am talking now specifically about the markings in the Webster? A. Well,—

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x Q. 317. Does a vertical blue marking in the portion of this exhibit containing pages from Webster's dictionary of 1847 indicate that matter comprehended by that marking has been paraphrased or abridged and inserted in the paraphrased or abridged form in defendant's dictionary? A. No, not all of it, no; we don't claim that.

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x Q. 318. What does that marking mean then? A. The marking means that that paragraph in Webster or those little paragraphs are the source of those definitions in the two books in question.

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x Q. 319. You wish to modify and change your testimony then as to what this marking means? A. Well, I say it means one of the three things that I said. I forgot the third point. You will find it in my affidavit, however. Very often we will find that Webster has spread himself; that is to say, that Webster has put under three heads what we put under one.

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x Q. 320. I ask you now to point out under any head in your dictionary an abridgment or paraphrase of the language which you have marked in Webster's dictionary under the word "adhesive" and which I quoted to you? A. Well, the very words, the ones you show me—well, that is an exception; Webster's is an extension of the rest. We find that Webster has used or we have used the exact words that Webster has there, in the first place; Webster has gone on in his encyclopedic paragraph down below in small type and shown various ways in which these words are used. We want to call attention to that fact, that our book is not encyclopedic. If you give all the definitions that cover Webster's encyclopedic paragraph—

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x Q. 321. You cannot then point out in defendant's book any paraphrase or abridgment or the sense of the quotation which I have made from Webster's dictionary, and which you have marked as having been paraphrased and abridged?

MR. CARROLL: I object to this repetition of the same question over and over again on the ground that the witness has already testified that the meaning of the word "adhesive" which is exemplified by Webster's encyclopedic phrase "adhesive plaster" is included in the definition given in our book; that is to say, any one reading our book and reading the Webster paragraph would understand what an adhesive plaster was.

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x Q. 322. Do you think that fair marking to mark the definition of adhesive plaster or adhesive inflammation, adhesive slate, which you have marked under the word "adhesive" as having been paraphrased or abridged? A. The point is, what is adhesive? Webster gives a number of definitions, and they are definitions that correspond almost word for word with what is in our books. Below he gives "adhesive plaster" and he gives "adhesive slate," and so forth, and they are all thoroughly explained, they are abridged; that is an abridgment to show that we give the sense of Webster's paragraph in our paragraph in a few words. Now, he might have said "Adhesive" a thousand things, and it would all go under the same head. After all, what is adhesive?

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x Q. 323. And you having used the single word "sticky" which is contained in Webster, you mark all the other thousand words there as an abridgment, and you would deem that fair marking; is

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that correct? A. Well, we have other words there that don't come from Webster. That much of a coincidence is not very important.

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x Q. 324. Do you still insist then that all of the language comprehended by the vertical blue mark in the margin of the word "adhesive" and its definitions and illustrations as it appears in Webster's dictionary of 1847 is properly marked as having been abridged or paraphrased and inserted in defendant's dictionary? A. Yes.

x Q. 325. And are the other vertical marks in this exhibit prepared upon your same theory? A. Prepared on the same theory, on the theory that the Webster has either—prepared on the theory that this has been abridged or paraphrased from Webster or from not necessarily the same title, but from a title nearby and relating to the same thing.

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x Q. 326. You have marked this particular matter as having been paraphrased or abridged, and I ask you again definitely and particularly to point out what you deem an abridgment of the three definitions given in Webster?

MR. CARROLL: Again I object, and I direct the witness no longer to answer this line of irrelevant testimony, which has been many times answered.

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MR. HALE: Complainant is trying to obtain a fair and frank answer to a fair and frank question, which admits of an answer yes or no, or at least of a definite pointing out, if such a thing can be done.

MR. CARROLL: Defendant's counsel is satisfied to stand on the answers as they have been given.

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MR. HALE: Will you please answer the question?

MR. CARROLL: No, I direct him not to.

MR. HALE: Complainant's counsel excepts to the direction to the witness not to answer the question, and to the refusal of the witness to answer the question, and requests the Examiner to certify the same to the Court for a ruling as to the propriety of the question and the sufficiency of the witness' answer, and as to his duty to answer this question and this line of questions.

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MR. CARROLL: The general objection is made to this line of questions, that in each instance the exhibit speaks for itself. The particular question which has not been answered, remains unanswered at this third reappearance, for the reason that it has been already multifariously answered.

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x Q. 327. Under the word "acute" in Webster's dictionary of 1847 as contained in your marked exhibit, I find seven numbered paragraphs giving seven meanings and applications of the term, the first six of which you have marked by a vertical line, as having been abridged or paraphrased and inserted in defendant's dictionary. Among these meanings I discover a geometrical meaning as follows: "An acute angle in geometry is one which is less than a right angle, or which subtends less than ninety degrees; an acute angle triangle is one whose three angles are all acute or less than ninety degrees each; an acute angle cone is one the angle at the vertex of which is acute." I also find a meaning numbered 5 in the Webster dic-

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tionary, "An acute accent is that which elevates or sharpens the voice." You have marked those definitions as having been paraphrased or abridged. The entire definition under "acute" in this dictionary is as follows: "Sharp pointed; intellectually sharp; quick of perception; severe, as pain or symptoms attending a disease; high in pitch, shrill." What part of defendant's dictionary there do you deem a paraphrase or abridgment of the two definitions and meanings quoted from Webster's dictionary which you have marked as having been abridged?

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MR. CARROLL: I object to this question on the ground it has already been testified by this witness that in an abridged dictionary it is necessary to omit encyclopedic matter, and that it is also well to omit technical definitions. It is apparent that the matter referred to by counsel for complainant clearly comes within these two heads, that therefore the question has already been fully answered by this witness, and further more the exhibit speaks for itself.

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MR. HALE: Does defendant's counsel mean to say that the meanings quoted from Webster's dictionary were omitted in accordance with that theory from defendant's dictionary?

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MR. CARROLL: Defendant's counsel does not know why the matter spoken of by complainant's counsel or such parts of it as appear to be omitted were omitted, but it appears to him, as it will appear to any sensible and reasonable man, that the definition in the dictionary of the defendant is quite adequate in an abridged dictionary,

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and contains practically all of the definitions of the word "acute" which are given or exemplified in the unabridged Webster.

MR. HALE: An omission cannot fairly or honestly be marked as an abridgement or a paraphrase, especially as this witness has testified that his meanings of the words "abridgement" and "paraphrased" implies that the sense of the definition is preserved.

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THE WITNESS: You harp upon two points.

x Q. 328. I am only harping upon the question of the marks? A. There are three things allowed; one is paraphrasing and one abridging. Now, I said there was a third point. Very often Webster would put under two or three heads that which in the abridgement is contained under one or vice versa. At any rate these things are illustrative rather than definitive.

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x Q. 329. That does not answer or explain this marking, because here Webster has placed under one head the matter quoted, you have marked it in your exhibit as having been paraphrased or abridged by defendant—A. (Interposing) Or transferred—

x Q. 330. I ask you please to point out where in defendant's book, an abridgement, paraphrase or transfer of the matter quoted may be found so as to justify the marking?

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MR. CARROLL: I again object to this line of examination as purely and obviously argumentative and an attempt to argue the witness out of a sensible and sound position.

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MR. HALE: The marking is utterly unfair and unreliable and I propose to show it.

MR. CARROLL: If the marking is of the character spoken of by complainant's counsel, it will appear so to the reasonable sensible and acute Court. Defendant's counsel again is ready to stand upon the exhibit as it appears.

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THE WITNESS: Here are seven definitions in Webster. Out of them all, for example, we have figuratively—

MR. HALE: I object to the line on which the witness has started as utterly irresponsible to the question.

THE WITNESS: No, it is not irresponsible to the question.

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MR. HALE: I have asked him to point out where the matter quoted may be found, and I am willing to let the marking stand for the other meanings of the word.

x Q. 331. Please answer the question responsively. (Question repeated) I ask you please to point out where in defendant's book an abridgement, paraphrase or transfer of the matter quoted may be found so as to justify the marking? A. In the first place, I think one was here, you say, "An acute disease." What were the two you objected to?

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x Q. 332. The geometrical definitions, and the definition of "acute accent" as found in Webster. Please point out what you deem a paraphrase of any of those definitions in defendant's book? A. An acute accent is high in pitch. That is taken from Webster's longer definition. It does not say anything here about music, but "high in pitch"

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is perfectly clear; shrill adds to it. What was the next you pointed out?

x Q. 333. "An acute angle?" A. Don't you think "sharp pointed" represents an acute angle.. And "intellectually" it says—

x Q. 334. That part was not in question. You deem then that the single phrase "sharp pointed" which appears in defendant's dictionary is an abridgement of the following matter which appears in Webster's dictionary and which you have marked as an abridgement or paraphrase, to wit, "An acute angle in geometry is one which is less than a right angle, or which subtends less than ninety degrees; an acute angle triangle is one whose three angles are all acute or less than ninety degrees each; an acute angle cone, is one the angle at the vertex of which is acute?" A. That is they are all sharp pointed.

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x Q. 335. And your position is that "sharp pointed" is a fair abridgement of the language you have quoted? A. Yes.

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x Q. 336. And you are prepared to defend your marking of it as an abridgement upon that statement? A. Yes.

x Q. 37. And is that the principle you applied in marking other things in Webster's dictionary which you term abridgements or paraphrases? A. Let me choose two or three, will you?

x Q. 338. I want the answer to this question? You will have your chance later with your own counsel. I am trying to find out the principle upon which you marked these things? A. I hold that in condensing or abridging anything from Webster, it is necessary only to give in the briefest possible way that which will characterize the object or thing, whatever it is. I hold that the

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Webster definition is not a definition. It is an encyclopedic illustration, because, after all "sharp pointed" is sufficient, and "sharp."

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x Q. 339. That may justify the omission of Webster's encyclopedic matter, but I fail to see how it can justify your marking the matter quoted as having been abridged or paraphrased and inserted in defendant's dictionary, and I therefore ask you why you mark that as an abridgement? A. I mark that as an abridgement because, if you—you must remember that the adjective and the noun together are not legitimate dictionary matter, but if anybody says "triangle" or if anybody says "cone" or "acute cone" it means a sharp cone, sharp pointed cone, "sharp" pointed and "sharp" cover the point, and that matter in music is entirely covered because it says it is sharp in pitch, acute in pitch.

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x Q. 340. I made no reference to the musical use? A. I thought you did.

x Q. 341. No, I refer to "acute accent" meaning No. 5 in Webster's dictionary? A. Well, anybody would say a sharp accent then. I think that that is a very much condensed definition, which really, however, explains what is in Webster.

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x Q. 342. In other words, you discover sufficient similarity between the words of defendant's dictionary, "sharp pointed" and the geometrical definitions, quoted from Webster to draw the conclusion that defendant's dictionary was derived from and based upon Webster's dictionary? A. Based upon it, yes. You will notice there are other definitions there that don't profess to be derived from Webster, but I think I might have marked with the parallel lines that matter of "acute in pitch;" that is equivalent to your definition there of a musical term. I did not do it.

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x Q. 343. I have not referred to a musical term?

A. No, you have not referred to it. I am regretful about it, that I did not mark it.

x Q. 344. Do you mean to say that the meaning of an acute accent referring to the pronunciation of a word is adequately abridged by the phrase "high in pitch or shrill" which appears in defendant's dictionary? A. Yes, that is what an acute accent is as distinct from a grave accent.

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x Q. 345. Webster here defines an acute accent as follows: "An acute accent is that which elevates or sharpens the voice?" A. That is a foolish definition. This is much better.

x Q. 346. You prefer yours? A. I prefer mine, yes, I think it is much more true.

x Q. 347. So you think all of the matter marked under the word "acute" in Webster's dictionary in this exhibit is properly marked as having been paraphrased or abridged in defendant's dictionary. A. In the sense that whatever is in the defendant's dictionary would be sufficient for the understanding of any sensible person if he had to apply to "accent" the words as Webster has done. I object of course to the encyclopedic matter being inserted there. That is to say, take an acute accent. We just say "acute." What is an acute accent? Why, a shrill sharp accent.

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x Q. 348. Is your marking of this word "acute" a fair sample of what you have termed abridgement or paraphrase throughout your markings of this exhibit? A. I think it is a rather close marking, but I am willing to stand by it. You will find as I say, if you let me choose a few parallel bars there you would get an average, or if we come to that later, Mr. Carroll can bring that out. You must not take two or three which you

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object to. They are very closely marked I admit. In these two or three instances the marking is very close, but I still think that it is adequate. And in order to get a notion of my theory one should bring up a great many more instances, not pick them but choose them at random.

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x Q. 349. I am using the exhibit which you yourself prepared and have had an opportunity only to examine a few instances of what you have marked as paraphrasing and abridgements. I am using your own selections. A. You have to use them just as they come. Why not?

x Q. 350. As indicating what the marking means? A. Begin with the first page and go right along and see what you find. There you are, going to jump about twenty pages to get something.

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x Q. 351. In this exhibit of yours you have marked all of the matter under the word "theology" in Webster's dictionary of 1847 with the vertical blue mark indicating that the whole of it has been paraphrased or abridged and carried into defendant's dictionary? A. It does not mean that the whole of it has.

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x Q. 352. Wait a minute until I ask the question. What did you say? A. The whole of it—I object to that out of a Websterian Encyclopedic paragraph. The editor has abridged so much, as he should, but he really did not care to go into some theological point.

x Q. 353. If the editor of defendant's dictionary did not use and abridge or paraphrase the whole of it why did you mark the whole of it as having been so used or paraphrased or abridged? A. I don't know what the thing is. I am talking of generalities. Show me the instance. As

Mr. Carroll said each of these has got to be judged on its merits and I cannot tell without seeing it.

x Q. 354. I will show you the exhibit, and I call your attention to the fact that under this word "theology" in Webster's dictionary Webster defines "Natural Theology, moral theology, speculative theology and scholastic theology," in addition to other definitions of the word. These definitions cover about twelve lines all of which you have marked with a blue mark to indicate that it has been paraphrased or abridged. Please find the meanings of those terms in an abridged or paraphrased form anywhere in defendant's dictionary and particularly under defendant's word "theology?" A. There are three classes of theology you spoke of, I think.

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x Q. 355. No, four; natural, moral, speculative and scholastic? A. Now, you know that some of this is in the exact words of Webster.

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x Q. 356. I am not alluding to the parentheses underscored to indicate identity. I have excluded that part of the definition from my question, and ask you to point out the alleged paraphrase or abridgement of the four definitions given by Webster and marked by you? A. Under "ordinary theology," "the science that treats of the existence, nature and attributes of God, especially of man's relation to God; divinity." And there is next to it "Theophany," "the manifestation of God to man by actual experience." The point is "the science of God and divine things." This seems to me quite sufficient. You have a long definition here with all kinds of theology in.

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x Q. 357. None of which are defined in defendant's book, are they? A. Yes, which are covered by the defendant's book, as, for example, here,

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“the science that treats of the existence, nature and attributes of God, especially of man’s relation to God; divinity.”

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x Q. 358. Is not all of that comprehended by the underscored portion of the Webster definition indicating identity? A. Not all of it. I ought to have marked some more. For instance, he has “divinity” here which we have also, but I have not marked it. Remember, this is a very long paragraph; in fact, it is three paragraphs. Now, there are two general points, the relation of man to God, and the knowledge which man has of God, and the nature and attributes of God; divinity. Now, you start off with divinity, which I did not mark unfortunately, but should have done.

x Q. 359. Mark it now if you want to?

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MR. CARROLL: No, we will stand on the exhibit as it is. We are satisfied with the exhibit as it is.

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THE WITNESS: All that was essential for our purpose and for the purposes of the editor of this book, which I had nothing to do with editing, is this: “The science which treats of the existence of God,” and that I should call—take the word down here “Natural theology.” That is the knowledge of God from his works, especially of man’s relations to God. That is merely theology, and “divinity” stands by itself as the general definition of theology. Speculative theology of course—these are all encyclopedic, but we have got under the head of “theology” the things that belong to it told in a very simple way; that is “the science that treats of the existence, nature and attributes of God, especially of man’s relation to God; divinity.” I think that that is a

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paraphrase of your paragraph; in fact, it contains your actual words in part.

x Q. 360. Which you have marked in the exhibit? A. Marked in the exhibit with the exception of one word.

x Q. 361. In all fairness, is defendant entitled to the benefit of any greater similarity than is indicated by the underscoring? A. Well, I think that is sufficient; as a matter of fact, you may merely underscore these words, because taken by themselves they don't make sense; they don't hang together; they are not a complete sentence; the sentence is a very very long one.

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x Q. 362. How about the separate sentence to which I call your attention? A. The separate sentences represent the various forms of theology which are defined here, though not by name, and in an abridged dictionary intended for young, immature people, it is all that is necessary.

x Q. 363. You understand, do you not that the subject of the present inquiry is not the adequacy of defendant's definitions— A. Oh yes upon the adequacy of the abridgement. This is an abridgement intended for young people and immature people to define the various branches of theology, it is not necessary to define them as such, but they are defined in substance out of your paragraph, and the identity of this definition here with your paragraph is shown by the actual words that are used; they are your words. I want to mark one more. That is all I have to say. I think for an abridged dictionary that is a sufficient abridgement.

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MR. HALE: The answer of the witness is objected to as wholly irresponsible.

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THE WITNESS: Can't I respond then somehow or other. Whatever you have in the Webster 1847 is conveyed in sense by the close abridgement of the writers of these two dictionaries, and part of it in your own words.

x Q. 364. And that part you have marked? A. Yes.

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x Q. 365. Then why do you try and take credit for matter which does not appear in any manner? A. It does not appear in words; paraphrasing does not mean repeating the words, but that comes under the head of giving the sense of it. Now, this is the sense of it in our definition.

x Q. 366. You have stated that a paraphrase or an abridgement implies an original, and that the paraphrase or abridgement must contain the sense or idea of the original? A. Yes, I think it does.

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x Q. 367. Now please point out the senses of the original Webster which I have called your attention to under the terms "natural theology, moral theology, speculative theology, and scholastic theology," all of which you say is contained in defendant's definition?

MR. CARROLL: I object to this as having been already fully answered by this witness.

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THE WITNESS: Mr. Hale says it is not responsive. I would like to put it in some form that it would be responsive.

x Q. 368. (Question repeated) Now, please point out the senses of the original Webster which I have called your attention to under the terms "natural theology, moral theology, speculative theology, and scholastic theology," all of which

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you say is contained in defendant's definition? A. I don't know whether I am to say any more or not. I have not anything to add to what I have already said.

x Q. 369. You cannot point out anything further then? A. I point out, to me it is sufficient; everything in the Webster paragraph, that is as much as you want for an abridged dictionary, is there taken from the book, as shown by the similarity of the language in part.

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x Q. 370. Do you assert that defendant's dictionary contains enough similarity to indicate that the matter referred to in Webster's dictionary, under the heads "natural theology, moral theology, speculative theology and scholastic theology" aggregating some eleven lines are actually used and incorporated in defendant's book?

MR. CARROLL: I object again on the ground that this has already been fully answered by this witness, and request the witness not to answer unless he has something to add to what he has already said.

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A. If I answered it would be merely to repeat in different form what I have already said.

x Q. 371. You maintain then that this marking of the entire Webster definition under "theology" is a fair marking to indicate an abridgement or paraphrase? A. It covers theology, yes.

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x Q. 372. And that is a fair sample of what you have designated as abridgement and paraphrase throughout this exhibit? A. I think I have some much more—that the abridgement is very much more obvious in some cases—in most cases. I don't consider the few instances you have given justify you in forming any conclusion about the

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in matter at all until you have allowed me or Mr. Carroll, rather, to bring forward the other or a great many passages marked with vertical bars, so that a really true and fair opinion can be formed.

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x Q. 373. In your exhibit under the word "adventure" (noun) you have marked with your vertical blue mark as having been paraphrased or abridged the third meaning given by Webster, which is as follows: "A remarkable occurrence; a striking event, more or less important; as the adventures of one's life." The entire definition of adventure in defendant's book is as follows: "An event, the issue of which is determined by chance; v. t., to hazard or risk." I fail to find the meaning or the sense quoted from Webster and which you referred to as having been paraphrased or abridged. How do you justify that marking? A. If you want to know, Webster has two heads to "adventure." One says to "dare" and the other "to hazard." Now, that is wild and asinine.

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MR. HALE: It is also irrelevant and irresponsible.

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THE WITNESS: You mean the noun. I should say that was not only a paraphrase, but the editors there have actually taken your words.

x Q. 374. Are you referring now to the particular meaning which I quoted, none of which words are underscored? A. Will you read the question?

x Q. 375. (Previous question read by the stenographer as follows): Are you referring now

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to the particular meaning which I quoted, none of which words are underscored? A. I justified the marking in this way; that out of what occurs here we have taken, or the editors took so much as suited his purpose. The thing that you referred to, the quotation from Bacon, is an obsolete meaning; he did not, therefore, take that, but he marked the whole paragraph because he got all his meaning out of it, such as "hazard" and "risk" and "chance." It does not follow that everything in the marked paragraph appears in some form in the dictionary in question.

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x Q. 376. In other words, you have marked "senses" in Webster with this vertical mark which do not appear in any form in defendant's dictionary; is that correct? A. I have marked paragraphs that contain so much as seemed necessary for the purpose of the definition of adventure, not taking obsolete—that is, I did not take "bill of" or "note of" at the bottom.

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x Q. 377. I have not inquired about that phrase as yet? A. Well, I say out of that paragraph comes so much as is necessary to satisfy the editor's notion of a word, definition, and if he did not choose to put in any technical part of it, why, none the less I marked the paragraph; because our definition comes out of that paragraph it does not follow that everything in the paragraph has got to be worked in.

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x Q. 378. This is a separate and separately marked paragraph in Webster, giving as the meaning of the term "adventure" as "a remarkable occurrence, a striking event." Do you find that sense given in the defendant's dictionary; please answer yes or no. A. No.

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x Q. 379. Yet you have marked that paragraph of Webster's definition as having been paraphrased or abridged? A. The whole paragraph, because the whole paragraph is not there, as usual, with a sort of a sub-paragraph to the thing, but it is a definition of a series of definitions, and out of them the editor took such as suited his purpose, and the rest he left.

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x Q. 380. And you discover internal evidence of the fact he used this paragraph of Webster's 1847 edition in composing the definition of the word "adventure" in defendant's dictionary? A. You find the same words.

x Q. 381. Why did you not underscore those words, then, or any of the words in that paragraph which is paragraph number 3 in Webster's dictionary? A. Paragraph No. 3 was not in question; was not touched.

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x Q. 382. It is the only paragraph as to which my question related? A. "Hazard," "risk," "chance." No, you are taking too much. All these objections of yours relate to where Webster goes away and takes the word and hitches it up to some other word and expects to find that we have done the same. We have what a dictionary ought to have, which is a definition of a single word. You ought not to have doublets and triplets and all that sort of thing. I marked the paragraph because out of the paragraph came our definition, or a definition of the defendant's.

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x Q. 383. You have stated certain omissions in defendant's dictionary. Why do you mark omitted matter as paraphrased or abridged matter when not even the sense of it is contained in defendant's dictionary? A. Well, it might have been marked that way there.

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x Q. 384. Do you think it was proper to mark paragraph No. 3 under the term "adventure" in Webster's dictionary as having been paraphrased or abridged? A. Well, not if it gave you that impression, but the notion is that it is the whole paragraph that is in question; that is, the whole series of paragraphs in question, and not that single one.

x Q. 385. So in preparing this exhibit then whenever any part of Webster's definition seemed similar you have marked the whole of what he put under the word; is that correct? A. I take the whole paragraph and say out of this paragraph we get a definition. 6570

x Q. 386. Suppose there were fifteen paragraphs, as in this instance, you would take the fifteen paragraphs although only one bears any resemblance whatever to the definition; is that correct? A. Well, no, that is not correct. It is correct in this instance. 6571

x Q. 387. You have underscored the words "hazard, risk, chance." In Webster's dictionary as being identical with the words used in defendant's dictionary. And this identity caused you to mark this paragraph 3 as paraphrased? A. The whole paragraph was marked; that is a paragraph, yes, it caused me to mark the whole definition of Webster from the start, showing that it was undoubtedly used by the editor of that book or those books. 6572

x Q. 388. But your marking asserts that this particular matter—A. (Interposing.) No, you mistake there—

x Q. 389. (Interposing.) Wait a moment until I get through with this particular matter. In addition to the words underscored which you assert

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were copied, that the additional matter was paraphrased or abridged and have taken credit for that much matter as having been derived from Webster's dictionary? A. No, I don't take credit for that; I take credit only for what—you see, in the first place, the exhibit stands there for anybody to look at it. It is not that I have got to say something, but there is something for people to look at, and my understanding is if a paragraph, that is to say a long definition or series of definitions in Webster contain the material for a definition for us or for the defendants, then the defendants owe to Webster what they took from him; that is to say, they owe their phrases or words or whatever it is to him, and the thought, if it is only a thought. He has got another definition.

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x Q. 390. And you offer this marking of this paragraph to which I have called your attention as evidence of the fact that defendant's book was based or founded upon Webster's dictionary of 1847? Yes, the evidence is cumulative. It does not consist in one paragraph or one exhibit or one thing; the evidence depends upon the whole exhibit itself. It is the cumulative force of a dozen, twenty, thirty—I don't know how many there are.

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x Q. 391. Of this kind of thing? A. Well, of actual copied words or of paragraphs which contain words that have been transferred to these two books. It does not follow—necessarily a paraphrase or an abridgement does not look so much to the words; it looks to so much of the thought as it wishes. Well, it chose very little out of that, but nevertheless that to my mind was a Websterian source.

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x Q. 392. You don't mean to say—A. (interposing) One is not obliged to take everything that Webster has there.

x Q. 393. No, but he is obliged to repeat the essential sense of it if he marks it as a paraphrase or abridgement, is he not? A. Take the essential sense, the main sense; that of course is to "dare, hazard and adventure."

x Q. 394. I mean the main sense of the paragraph marked as an abridgement? A. Well, if you take that by itself and hold it up by itself and say, "Here, this is a blue mark, and there is no sense in it, there is nothing about it in the other book," why, that might be—I don't know how that would be looked at, but the way I look at it is that that is not to be taken alone but the whole amount, the whole definition, in Webster, I have taken, and out of it so much is transferred to the other book. Now, it does not make any difference whether it is a sentence or five, so that you have the ear marks; you will find that there is less paraphrasing than there is actual copying and that is the strongest thing. I don't hear you say anything about that. 6578

x Q. 395. You have attempted to add these instances which you have marked as paraphrases to the instances of identity which you attribute to copying and have founded your opinion in part upon them, have you not? A. Yes. 6579

x Q. 396. And is this a fair instance of part of the basis—A. (Interposing) No, that is no instance comparatively. There are instances that will make you gasp when you get them. 6580

x Q. 397. Do you mean to assert that this third definition of the word "adventure" as "a remarkable occurrence or a striking event, more or

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less important," as given by Webster is an obsolete meaning of the term? A. Yes, he has nothing later than Bacon.

x Q. 398. Do you mean to say that that is an obsolete meaning of the term? A. A striking adventure, a striking occurrence?

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x Q. 399. Such as a striking event or a remarkable occurrence? A. No, but I was saying on general principle as far back as Bacon they are often obsolete and in many other cases they would not necessarily be—

x Q. 400. You don't mean to say that "adventure" is obsolete? A. Oh, no.

x Q. 401. You don't mean to say that "adventure" in the sense of a "remarkable occurrence" is obsolete? A. No.

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x Q. 402. Or that "adventure" in the sense of "a striking event more or less important" is obsolete, do you? A. No.

x Q. 403. And you don't find that meaning given—A. But I think it is obsolescent. When you say an important occurrence or—what is that phrase there?

x Q. 404. A striking event, more or less important? A. That is not obsolete, no.

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x Q. 405. Under this same word the concluding paragraph in Webster defines a bill of adventure as follows: "A bill of adventure is a writing signed by a person who takes goods on board his ship wholly at the risk of the owner."? A. Obsolete.

x Q. 406. You have marked that as having been paraphrased or abridged and inserted in the paraphrased or abridged form in defendant's dictionary. That is not true, is it? A. No, I have not marked it as necessarily having been abridged. I have marked all that occurred under "ad-

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venture'' as a source of the definition of the two books.

x Q. 407. Then that is all that the vertical marking means? A. The vertical marking means that out of a mass of material the editor or editors of those two books have taken the meaning or perhaps sometimes the exact language of the original Webster; but I did not divide it up piecemeal that way. I say, here is a source, that is, a mass of material; out of it comes a little or a lot; it depends.

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x Q. 408. In other words, then, whenever you found any identical word in the respective definitions you underscored them and then placed a vertical mark beside all the matter in Webster and termed it a paraphrase or an abridgement; is that correct? A. It depends on how closely they were kept; you will find the bill of adventure, which is a thing out of use—

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x Q. 409. That is not contained in defendant's dictionary at all, is it? A. No.

x Q. 410. Yet you have marked it. What does the marking indicate in that case? A. Except for the bill of adventure which is obsolete—that is a very good instance. Here is a—

MR. HALE: I object to the witness continuing in an irrelevant and irresponsible manner and ask the witness to answer the question.

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THE WITNESS: Let me answer the question. It may not ease your mind very much. You want to know what I mean by a vertical bar, don't you? Isn't that what you have been trying to get at for an hour?

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x Q. 411. I want to know why you have placed a vertical bar by certain matter which is pointed out and which does not appear anywhere in Defendant's dictionary? A. But that is not the way to get at it.

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x Q. 412. That is what I want to get at? A. Because it was a part of a mass of material out of which I did get something; that is to say, they cannot be separated, at least they all belong to the definition of "adventure"; the editor takes out so much of that paragraph or series of paragraphs, all of them linked together, what he wants. The rest he throws aside. What you have in Webster represents something, that has been milked. He does not necessarily take everything out of it, but the paragraph is marked with the vertical bar as being a source.

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x Q. 413. That does not harmonize with your definition of abridgement or paraphrase because you specifically stated that the sense must be preserved? A. Yes, the sense is what you take.

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x Q. 414. Here in Webster I pointed out certain specific senses which have not been preserved in defendant's book and nevertheless you have marked them as having been paraphrased or abridged, and I ask you to justify it or to admit that the marking is wrong? A. It is only in such particular instances as the bill of adventure. That is partly covered by the other definition in the defendant's book. What is the definition you objected to anyhow that is not covered in the "certain occurrences."

x Q. 415. I both read and showed you the exhibit containing the definitions? A. I know, but we have been talking a good deal since then.

2 Q. 416. I ask you to point out in defendant's dictionary any word or words taken from the concluding paragraph under the word "adventures" in Webster's dictionary which reads as follows: "A bill of adventure is a writing signed by a person who takes goods on board his ship; at the risk of the owner?"

Mr. Cramm: I again object to this whole line of examination on the ground that the exhibit speaks for itself. I object further on the ground that the witness has already several times fully answered Mr. Hale's question, which is in the long and directed simply to discovering what Dr. Park went by his earlier writings, and which Dr. Park has several times explained he used to indicate the paragraph in Dr. Webster's book which was the basis or ground work or source from which the definition in defendant's book was taken, either as an acknowledgment or as a paraphrase, and the sole purpose of this exhibit is to show that defendant's book is based upon Webster's book, and it is understood by everybody that defendant's book is an acknowledgment and not a copy of an acknowledged book.

Mr. Hale: The witness has proposed and presented this exhibit as pointing out the internal evidence that defendant's book was based upon or taken from Webster's dictionary, and he has testified that his earlier writings indicate such internal evidence by means of similarity of some rather than language. I desire to find out—

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THE WITNESS: I beg your pardon, similarity of sense *or* language; sometimes it occurs you get the actual—

MR. HALE: (Continuing). I desire to find out why he has marked matter in Webster when no similar sense or language appears in defendant's book?

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MR. CARROLL: It has further been frequently stated by this witness that even in an unabridged dictionary he considers it is unnecessary to indicate encyclopedic matter and that particularly in an abridged dictionary he considers it superfluous. Much of the matter referred to by complainant's counsel is of the nature spoken of; that is to say, encyclopedic matter. Other matter referred to by complainant's counsel comes within the definition of technical matter; still other matter comes within the class which may be called obsolete and is therefore properly omitted from any up-to-date book. If complainant's counsel can find any other classes of matter omitted, it is requested that he prepare those for the use of the Court. Defendant's counsel is ready to stand upon the exhibit unexplained by the witness.

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MR. HALE: The explanation of why defendant omitted matter which appears in Webster does not explain why he marked that same omitted matter as indicating identities and similarities between defendant's book and Webster's, and presenting it as evidence that defendant's book was based upon or abridged from or in any way connected with Webster's dictionary.

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MR. CARROLL: The vertical mark is not intended to indicate identity.

MR. HALE: In many instances it does not even indicate similarity.

MR. CARROLL: If that be so, it speaks for itself.

x Q. 417. You have marked the paragraph relating to a bill of adventure which appears in Webster with a blue mark indicating some connection, similarity or identity in language or idea between defendant's book and Webster's dictionary. Please point it out if it exists in defendant's dictionary? A. That particular sentence does not appear at all in the defendant's book or anything about it. It is obsolete, but the whole mass of matter which it belongs to contained that which was used and consequently the mass was marked as a source.

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x Q. 418. That paragraph ought not to have been marked then? A. I don't say so. I think the whole paragraph might be marked, or I would be willing to put a red mark on it if you want to, if it would please you, and take that particular "bill of adventure" out; that is no part, however, of my contention—you won't let me explain, or rather you want me to explain too often the same thing.

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x Q. 419. In other words, if the vertical blue marks are taken as any criterion at all, the exhibit as prepared will indicate that there are more identities and similarities between defendant's dictionary and Webster's dictionary than in fact exists, and this instance under the word "adventure" is an illustration of that is it not? A. No. A vertical bar there does not mean that

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everything in there has been paraphrased and transferred to the smaller book.

x Q. 420. What does it mean then? A. It means that some of it, that certain parts of it, that it is a sort of reservoir from which something has been drawn.

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x Q. 421. Certain parts of all the matter that appears in Webster's dictionary under that vocabulary entry; is that what you mean? A. Yes.

x Q. 422. And that is the theory upon which you made these vertical marks upon this exhibit? A. Yes. And I say, as Mr. Carroll would say, the exhibit speaks for itself, and I believe that the Court will find, not picking out a few things, but looking at them all, that the case is made out. You said nothing at all about where the thing is word for word the same; that does not seem to affect your mind at all.

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x Q. 423. In your affidavit which you verified the 29th day of February, 1912, and which was used at the hearing of the motion for a preliminary injunction in this case in which you explained this identical exhibit which you prepared, I find the following language: "The blue lines at the sides of paragraphs on the pages taken from Webster's New Illustrated Dictionary indicate definitions manifestly abridged from definitions similarly marked in the pages of the 1847 dictionary." Was that statement true? A. Yes.

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x Q. 424. Is it true now? A. Yes; always was true.

x Q. 425. Do you wish to modify it in any respect? A. Not in any respect, no.

x Q. 426. You are not aware that your testimony as given to-day has modified that in any respect? A. No, because you won't take my ex-

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planation of what I meant by the marking. It does not mean that everything in the paragraph has been abridged, but that out of the paragraph an abridgement has been made or actual words have been taken. It has been a source for the definitions of the defendants. It may be very little sometimes.

x Q. 427. You do not mean by this vertical mark then that all of the matter embraced within it contains internal evidence that one book was used in the composition of the other?

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MR. CARROLL: Again I object to this question as having been many times answered by this witness.

A. No.

x Q. 428. I presume then there are many other instances in this exhibit where the vertical markings will embrace matter as to which there is neither any verbal identity or any identity of sense; is that true?

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MR. CARROLL: I again object. The exhibit speaks for itself.

A. I don't know. You have not asked a question. You first made a categorical statement, you asked something, and then you say; is that so. I don't know what you assume.

x Q. 429. Is the assumption contained in the question in accordance with the facts? A. No, I think not.

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x Q. 430. In this exhibit, under the word "adoption", in Webster's dictionary I find nine paragraphs consisting of thirty-three lines, comprising three definitions, and six specific illustrations, all of which you have marked with the vertical

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blue line which you say indicates that the same has been paraphrased or abridged. I find that you have underscored nine words in the first line and a quarter, as being identical in the two books. The entire definition under the word "adoption" in defendant's book consists of sixteen words, of which nine are identical with the words underscored in Webster. Point out any indication of abridging or paraphrasing the remaining paragraphs in Webster's definition as to which there is no identity either in language or in sense?

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MR. CARROLL: I again object to this question on the ground that the exhibit speaks for itself, and on the further ground that the exhibit is not intended as a conclusive proof of the fact that these books are based upon Webster's dictionary of 1847. In proof of that fact it is maintained that the books themselves which are in evidence speak for themselves. This exhibit is intended merely as a ready manuscript for the assistance of the Court in observing the similarities of defendant's book, with the 1847 Webster. If the Court finds that it is an incorrect instrument, it is for the Court to reject it on its own merits.

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MR. HALE: The witness has marked portions as indicating similarities where there is no similarity, and is now called upon to justify it.

THE WITNESS: Now, under the head of "adoption" the general definition is the same as Webster's word for word; also the secondary definition is the same as Webster's word for word; the remaining two lines cover the general sense of

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“adoption” without going into encyclopedic matter, and the paragraph is marked because as I say it was the source of the definition in the other book.

x Q. 431. You don't mean to assert by this marking then that the five paragraphs in Webster's giving specific meanings and respectively introduced by the words “adoption by arms; adoption by baptism; adoption by heart; adoption by matrimony; adoption by testament” are included in defendant's dictionary either in words or substance? A. Well, in general substance, yes, in the sense of acceptance. I wish I had one of those defendant's books. Webster gives various kinds of adoption; adoption by arms, and all that, is obsolete. It is old; nobody would use that, but out of the whole series there we have a general notion of adoption which is according to Webster's own words which appear there, “the act of adopting; the state of being adopted.” Now, then “voluntary acceptance, admission into intimate relations, the act of adopting,” that is enough for an abridged dictionary, “the state of being adopted.” All the feudal laws and Roman laws in which adoption might take place would be out of proportion here, therefore, they are not taken, but from that encyclopedic mass in Webster one has the true definition and a very full, neat and good definition of what adoption is. You must consider the readers for whom these books are made. They are not readers that want to go into the question of adoption by marriage, adoption by arms, and all those things.

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MR. HALE: The answer is objected to again as not responsive, the question not being the adequacy of defendant's defini-

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tions, but whether or not there is internal evidence of the same having been abridged or paraphrased from matter in Webster's dictionary which this witness has marked as indicating it; and motion is made to strike it out.

x Q. 432. Do you regard that as a fair example of what your vertical markings mean in this exhibit? A. That is if you understand my definition of the vertical bar—

x Q. 433. I presume you are aware that you have departed widely from your first definition of the meaning of the vertical bar? A. No, not at all.

x Q. 434. And of the meaning of an abridgement and paraphrasing? A. No. The point is you seem to take it—

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MR. CARROLL: Please answer as far as possible, Dr. Peck, yes or no.

THE WITNESS: I will stand on that.

x Q. 435. You are willing to allow your markings of this word "adoption" to stand as a fair specimen of what your vertical blue marks mean in this exhibit? A. Yes; with all the other specimens.

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x Q. 436. I notice you have underscored the main vocabulary word in each instance. Do you deem that any evidence that one book was taken from the other? A. I don't think I understand you.

x Q. 437. In this exhibit I presume the blue marking is intended as you have stated to indicate either identities or similarities as the case may be? A. Yes.

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x Q. 438. I notice also that you have in each case underscored the vocabulary word itself. Do you regard that as evidence— A. (Interposing.) No, not at all. It is only for convenience of reference to show that they were embodied in both books.

x Q. 439. You don't rely upon that in expressing your opinion that one book was based upon or abridged from the other? A. No, not at all. That should really have been marked in red or blue or something like that. 6626

x Q. 440. Instead of marking these paragraphs and senses in Webster's which are not reproduced in any form in defendant's dictionary with a vertical blue mark, why did you not mark them with the red "o" to indicate an omission as you did in the case of words wholly omitted? A. Well, simply because I could not—at least I could—but my point was this, it comes back to the old definition of the vertical bar, that vertical bar holds together a mass of sentences and definitions and so on that were used, some of which were used. I think it would have been better now, as I look at it to have marked them separately. 6627

x Q. 441. But certainly it would have been fairer, wouldn't it, doctor? A. I think it might have been fairer to you. On the other hand I don't think the specimens you brought out here by any means are typical at all. I think they are about all that you would find of that sort; in other words, some paragraphs are so obviously paraphrased or represent paraphrasing that I could not say in them there might be something I did not care for or that the editor did not care for. I speak for myself only as representing the opinion of the editor or the purpose of the edi- 6628

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tor; I had nothing to do with it. My notion was there might be an odd paragraph where that which was taken is so entwined with what was not taken that you could not use the red marking very well.

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x Q. 442. Do you regard any of the particular instances which I have called your attention to as specimens of that last supposition of yours? A. Well, hardly, no. But you have to make one rule really for the whole thing.

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x Q. 443. And the best rule would be to mark only identities would it not? A. Yes, I think that might save a great deal of controversy and trouble. No, I beg your pardon, I won't say that; identities and similarities, because you see it is not alone what you find in these paragraphs, these paraphrase paragraphs, the matter there is never very important, it is the identity of language in the definitions that you find scattered all through there; that is what really counts. You could throw away all this without any damage to your case, but I think they are cumulative. As I say, they add weight to the actual identity of language, because they show an identity of thought and sense.

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x Q. 444. Such as the instances that I have specifically called to your attention? A. Yes. There is something in the paragraph which goes into one or the other two books at issue.

x Q. 445. Exactly as you have explained in answer to particular instances? A. Yes.

x Q. 446. And in no other way? A. In no other way? A. In no other way, unless it happens that sometimes there might be a whole string of these. You find yourself a list of say five or six of these paragraphs and you find two which you objected

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6633

10. For, the marking of the vertical bar of the whole series shows that out of that series material was taken from Webster and went into one of these books.

x Q. 447. My point is that the vertical marking can not be taken at its face value as indicating that all matter including everything has been either copied, paraphrased, or abridged and that conclusion is true, is it not? A. You mean to say that every item that has a parallel bar by the side of it has not been paraphrased or abridged, yes. Every item of a paragraph of a series of items that is true, yes. It is to call conveniently to the mind and the eye—of course, those paraphrases are rather subtle sometimes, and you have to look pretty hard to see where it comes out, and so also with abridgement. Here is a mass of information out of which certain things have been taken. Well, you mark down the whole lot. Sometimes you have taken of course, which is natural, of course it ought to be, it ought to represent your side as strongly as possible, and therefore you take only such instances as seem to be rather defective, but we have not seen any of the other side at all, and we have seen nothing yet of the identical words.

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x Q. 448. Your exhibit has all identical words underscored, has it not? A. Yes.

x Q. 449. So they will appear without question? A. Yes, there would be no doubt about those, but still I think it was not wrong; it might have been better to have marked with red the paragraphs, the specific sub-paragraphs, you might say that defined in an encyclopedic manner something or other. I think that as you say would have represented the thing a little better, but

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there were a great many instances of where the whole paragraph was bound and entwined together, and I testify that one would lose considerable advantage here if he marked them in red or he did not mark them at all.

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x Q. 450. You stated on your direct examination that there were instances in defendant's books where a dozen definitions in order have been taken outright word for word from Webster's Dictionary of 1847. Please point out any such instances. A. I did not say there was any instance where twelve consecutive definitions, but twelve definitions running along closely together might be found.

x Q. 451. Please point out twelve such instances. A. That is, wholly or in part? Instances where the words used by Webster are the words found here?

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x Q. 452. Where the definitions in order have been taken outright, word for word, from Webster's Dictionary. A. Not consecutively, because there might have been some words dropped from Webster or inserted by the editors of this, but a dozen that are very near together, with only perhaps a break of two. Is that what you would like?

x Q. 453. Point out a dozen such instances. A. Well, there are twelve in order that happen to be consecutive.

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x Q. 454. Call them by name. A. That is they are consecutive in this, in the small book.

x Q. 455. What they are; say "I read twelve words from defendant's dictionary as follows," to illustrate. A. "Admeasure, admeasurement, administer, administerial." Here is one break. Just put a blank line there. "Administration, administrative, administrator, administratrix, ad-

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mirable, admiral,"—that is in part—then there is one break. Put a blank line. "Admiration, admire." If you read from "admeasure" down through 'admire' you will find that there are twelve definitions which are taken wholly or in part, word for word from the Webster's 1847, broken by two words that don't paraphrase or copy or anything, that stand alone. There is more in Webster, but all that is there is taken from Webster.

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x Q. 456. You mean that the words underscored will be found in Webster? A. Yes, the 1847.

x Q. 457. Would they be found also in Worcester? A. Not the words, no; some of them would but Worcester would never copy Webster.

x Q. 458. Would these same words be found in the Century or the Standard Dictionary under these titles? A. Not the words, word for word. You must notice those, it is not merely here and there a word, but it is the solid definition taken right out bodily, and then on the next column there is another series of thirteen. It runs all through that way.

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x Q. 459. In other words, you think that comparing these words with any other dictionary than a Webster's 1847 Dictionary and underscoring identical words would not produce a similar result to the twelve or thirteen words which you have indicated in this exhibit? A. No. I have examined several dictionaries in that way, unabridged dictionaries and there is no likeness at all. You see, Webster's definitions were very good, and they were preserved from his 1828 down to 1847 largely, and therefore they are about the best definitions there were for clearness and simplicity.

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x Q. 460. And it is this identity which leads you to express the opinion that defendants' book is based upon or taken from Webster's 1847? A. I could not resist it; the result was, it seemed to me, a mathematical demonstration.

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x Q. 461. Of course, that argument would equally apply to any other prior dictionary which showed a similar amount of similarity or identity or a greater amount? A. That showed the same thing. In other words, you would not know where it came from, yes.

x Q. 462. I presume all dictionaries which contain accurate spelling and accurate definitions and are equally complete had a more or less inherent similarity? A. There is a kind of traditional vocabulary, you know; that is perfectly true.

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x Q. 463. As the definitions have to be expressed in the English language, necessarily numerous similar words will be used? A. But, for example,—

x Q. 464. Answer that yes or no, please, and then explain. A. I would say yes, similar words will be used; but that is not the point. That is not similarity; it is identity.

x Q. 465. You mean identity of phrases? A. Identity of words.

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x Q. 466. And that is what you have referred to in your testimony as proving that this book was taken from Webster's 1847 edition? A. Yes. It might be the same even in the 1828, but it is taken from Webster's; that is my point. It happened that I used the 1847, but, if I had chosen to, I might have gone back to the 1828, but I did not care to do that.

Q. 467. Have you any reason whatever to believe or think that this book was in fact based upon and abridged from or copied from any other dictionary than Webster's Dictionary of 1841 or Webster's Dictionary of 1858? A. I have no reason, no glimmer of light on the subject at all.

Q. 468. And you have received no suggestion to that effect? A. No. I am very frank with you. I tell you what I did and what I found, and you see what is there. If you know of any dictionary that was an older dictionary than these two and that contained the same wonderful reproduction, I think you should be fair and let us know, because one does not want to be on the wrong side of the house.

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Q. 469. Then everything you know about the source or origin of Webster's book is based upon the internal evidence discovered by you in the course of your comparison of it with other dictionaries? A. Yes.

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Q. 470. You have no knowledge or information other than that? A. Well, I have no personal knowledge. You mean, for instance, about men and transactions, and, for instance, somebody else abridged it. I don't know. I have approached it simply as a scholar would naturally, without falling into the question the personal equation at all. I have taken all the dictionaries and gone very faithfully through them, including the English dictionary.

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Q. 471. And have you never heard it suggested that this book was never based upon Webster's Dictionary and Webster's Dictionary was never used by its author? A. No.

Q. 472. You have never heard that suggestion? A. No. I have heard this suggestion—

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x Q. 473. I am trying to get your opinion. You have stated you have heard something on this subject? A. But it would not help you any.

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x Q. 474. I suppose that is for me to say. Did it affect your belief in any way? A. I simply heard that somebody else, an Englishman, this man Bond, took steps and made a very careful condensation of it, and, as I said, when I went through it, I found that it was practically identical with these. It is conceivable that Bond's was ahead of these two dictionaries, and they simply took his work and Americanized it and added a lot of American words, still that only takes you back to Webster again because Bond shows the same similarity.

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x Q. 475. Do you remember the name or title of the book you have referred to as the Bond book? A. I must ask leave to substitute that after inquiry. I have been through so many minor books of no importance. Bond was an English clergyman and evidently something of a scholar and he did his work very well; it was very neatly done with a good deal of discretion.

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x Q. 476. Did you discover much similarity between the defendant's Webster's New Century Dictionary, or Webster's New Illustrated Dictionary and this book of Bond to which you have referred? A. Yes, there was a very close resemblance.

x Q. 477. Were those substantially reprints one of the other? A. No, Bond's had a great deal that was purely English, that was not in these at all, and as I say, curiously—well, not curiously—Canadian or South African. That was before the Boer War. He had a lot of South African English, and so forth and Hindoo, that

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6657

is English, Hindoo and pigeon English, etc., and Chinese. That was the work of an Englishman obviously, and it seemed to me that it was more likely—I don't know, but Bond—I compared pages and pages of Bond with Webster's 1847, and I found so much matter that was in Bond that was not in either of these two books, nor in Webster, either, that I gave him credit for making an independent version, or else for taking one of these—there are numerous ones—and Anglicizing them, or something of that sort, but his work was very neatly done.

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x Q. 478. And that is all your information now upon the question of the source and origin of this defendant's book? A. Yes, that is really all, and I give them all in good faith.

x Q. 479. Did the book by Bond to which you have referred have any standing or reputation in this country as a standard dictionary? A. No, the edition taken by Scribner—Scribner bought an edition in England, which must have been rather a small edition. He sold it out and did not replenish his store, and that was the end of it, and I don't know the date of Bond exactly, because I was so perfectly certain that there was a much closer resemblance between these two books and Webster that it rather knocked Bond out.

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x Q. 480. So you don't believe this book was based upon Bond, then? A. Either of these books?

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x Q. 481. Yes. A. No, I don't believe so. It is possible, you know, but even so, that means Bond was as close to Webster where he was not Anglo-Indian or African or something of that sort; he was as close to Webster as these books, but these books have not any English element, except two or three places, where they would perhaps put

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them in on general principles. If it were proven that these two books had their source in Bond it would only throw you back one step, and you would have to admit that Bond was then the person who rifled the till of the 1847 Webster or the 1828 Webster. I am sorry Scribner's could not find—they thought they had an office copy. Publishers usually have an office copy of anything they have, but they had lost it and they could not give it to me, and the one I had for examination was borrowed.

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x Q. 482. Borrowed by whom? A. Well, I think it was borrowed—I don't really know him—by Mr. Banes, of Philadelphia, who is a friend of Mr. Wright's at the Syndicate. Anyway, between them they found it somewhere and I marked it up some, too, to show them although it was borrowed.

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x Q. 483. They never returned the book to you? A. I have not seen it since.

x Q. 484. You have not produced the book in this suit? A. Well, I have been talking and Mr. Carroll has not said anything. But I don't see what you would gain by discovering Bond. You could not touch him, anyway, because he was an Englishman and there was no copyright.

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x Q. 485. Don't you think that an Americanized version of an Anglicized copy of a foreign piracy from Webster's dictionary would be a pretty slim excuse for to-day marking such a book under the name of "Webster" dictionary? A. Why, there is no question of piracy, and I don't think there is any odium really in using Webster, which is of the past entirely, no matter whether it had been Anglicized or whether it was a straight Webster.

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x Q. 486. Do you know who actually compiled defendant's book as editor? A. No.

x Q. 487. Did you ever hear? A. Well, I have heard, but I did not know whether it was authentic and true or not. I understood that Mr. Roe did, but whether or not he did I don't know. His name has appeared upon the title page of the same thing, but so has Mr. Russell's.

x Q. 488. Is there any difference, doctor, between a noun and a phrase? A. Yes. 6666

x Q. 489. What is it? A. Well, a phrase is usually a preposition and its object; a noun, of course, is a single word. A phrase would have to be more than one word.

x Q. 490. A phrase might consist of a noun and an adjective, might it not? A. Yes.

x Q. 491. Would it be scholarly and accurate and in accordance with good lexicographical usage to place phrases in a dictionary and designate them as nouns. A. Well, that is what the Standard Dictionary has done very largely, and that is a good authority. 6667

x Q. 492. Do you as a literary man of wide experience regard that as good lexicographical usage? A. I don't, but I think it is a very convenient thing to have.

x Q. 493. It is erroneous however to call such phrases nouns, is it not? A. Yes. 6668

x Q. 494. Did you discover any such instances in defendant's book? A. But suppose I said this, I could make a sentence in which there may be a noun, for instance, some phrase like "never say die." I could make this "never say die" as a phrase. Now, "never say die" is a noun. You could say "square deal," which is a common phrase; that "square deal" is a noun.

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x Q. 495. Did you discover any instances of phrases given in defendant's dictionary and designated as nouns? A. A few, but Webster, I think, is open to censure. I don't think it is legitimate. That is a controversy, though between Webster and Worcester, whether Webster is justified in putting in, for example, a sort of adhesive plaster. I don't think he did put in "adhesive plaster."

6670

x Q. 496. Has Webster put them in? A. Yes. You pulled me up on that.

x Q. 497. I am sure you don't regard it permissible as Webster did it? A. I did not regard it should be put in as a title because I should think you should have only one word as a title.

6671

x Q. 498. Did not Webster put them in as subtitles in paragraphs? A. He put them in as subtitles, and out of that I think came the use with the Standard Dictionary; they put them in as titles; that is, they will have a lot of type with all sorts of slang phrases and everything else you can think of.

x Q. 499. It is not Websterian to insert phrases and designate them as nouns, is it? A. No.

6672

x Q. 500. There is a difference between a phrase and a compound word also, is there not? A. Oh, yes; but a compound word you cannot get uncompound really as a rule. You have got to have a compound word, otherwise you would not know what to do with the parts of it. It constitutes a compound word, one idea.

x Q. 501. Was it Websterian practice to make cross references in a dictionary to words and terms that do not appear in his dictionary? A. No.

x Q. 502. Did that occur in Defendant's Dic-

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6673

tionary in this case? A. Very seldom; perhaps half a dozen times.

x Q. 503. You know that it did occur? A. It occurs in works of high repute, that matter of the cross reference which does not hit—it is only after a book has gone through a great many editions you can be sure about that. I don't think that is to be made a subject of censure in a book. Of course, there is a little laxity of editorship here, but it comes in sometimes in a way you have to put it in as a cross reference in the first part, when you think you will have it somewhere else, or have not got your list or slip or something.

6674

x Q. 504. Accurate and informing definitions are a Websterian characteristic, I believe you have stated? A. Yes.

x Q. 505. In Defendant's book I find the following entries: "Engulf; same as Ingulf." Under "ingulf" I find the entry "ingulf," same as "engulf." Do you regard that as a Websterian definition? A. That is no definition; it is a cross reference, a double barrelled cross reference.

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x Q. 506. That is not a Websterian method of treating the meaning of words, is it? A. Oh, no, nothing that is careless or slovenly or inaccurate is Websterian. You might make that as a general answer to cover the page.

x Q. 507. Neither the word "engulf" or "ingulf" is therefore defined in defendant's dictionary, although appearing in the vocabulary? A. That is true.

6676

x Q. 508. What is the Websterian method of spelling the word "sprite"? A. "S-p-r-i-t-e."

x Q. 509. How is it spelled in Defendant's Dictionary? A. I really don't remember.

MR. CARROLL: The dictionary speaks for itself.

6677

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THE WITNESS (after examining Webster's New Century Dictionary): I don't find the word in the Webster's New Century Dictionary.

x Q. 510. In Webster's New Illustrated Dictionary I find the entry "spright, n. a sprite"? A. I did not know that spelling, s-p-r-i-g-h-t.

6678

x Q. 511. Is that spelling "spright" the Websterian spelling of that word? A. No, nor anybody else's at this present time. It may have come down from Nathan Bailey.

x Q. 512. I do not find that the word "sprite" referred to in the definition of "spright" is in the vocabulary of Defendant's dictionary at all? A. It appears not.

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x Q. 513. And the same is true of Webster's New Century. Therefore it would appear that the meaning of "spright" cannot be ascertained from Defendant's Dictionary? A. No, it does not give the cross reference does it?

x Q. 514. No. Is that a Websterian characteristic? A. No, that is not Websterian.

x Q. 515. It is not a Websterian characteristic to define words in that manner? A. Nor to spell them so.

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x Q. 516. Is it at all common in Defendant's Dictionary to use words in the definitions that are not defined in the main vocabulary? A. No, it is not at all so. It is not a characteristic; it is just like the rest of an ex parte action. Take the exhibition of a case where you can pick out a few things. You can do that in Webster.

x Q. 517. It not infrequently occurs in Defendant's Dictionary, however, and you know it to be a fact that it does occur, does it not? A. It does occur. In the 1847 Webster, they offered one dollar for every misprint or mistake. Caleb Cushing sent them in a list of over 40,000.

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6681

MR. HALE: All of the witness's answer referring to the 1847 edition being the concluding portion thereof is objected to as not responsive, and hearsay, and irrelevant, and motion is made to strike it out.

x Q. 518. It was Webster's theory and practice where he inserted both the American and English forms of spelling words to define the term under his preferred American form, was it not? A. Yes. 6682

x Q. 519. Has the defendant in its dictionary in this case followed that principle? A. Well, the defendant in this dictionary has not distinguished, that is to say, it does not give both spellings, or only sporadic words, it might be in scattering instances, but Webster went right along and gave a great many English spellings. Now, there are not such a great many English spellings in the defendant's book. 6683

x Q. 520. What is the Websterian spelling of the word "Cauldron?" A. Well, he got it down to "caldron."

x Q. 521. What was the English spelling of it? A. "Cauldron."

x Q. 522. Webster defined the word under "caldron?" A. Yes.

x Q. 523. In defendant's book I find the entry "caldron;" see "cauldron;" and under "cauldron" I find the term defined. Was that a Websterian practice? A. No. But that word "cauldron" is one word that Webster did not impose upon people. You find as many people writing "cauldron" as you will writing "caldron." 6684

x Q. 524. In defendant's book I find the word "radicel" defined as "a rootlet." A. That is a misprint.

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x Q. 525. It should be spelled how? A. "Radicle."

x Q. 526. Defendant's spelling then is an error? A. It is a typographical error.

x Q. 527. Under "rootlet" in defendant's dictionary I find it defined as "a radicle?" A. Well, the initial mistake was made by some one.

6686 x Q. 528. And repeated? A. Well, it was repeated. It defines it really under "radicle."

MR. CARROLL: It appears also defined "radicle" and it is defined also under the latter spelling.

x Q. 529. We therefore find aside from the error in spelling that defendant's dictionary defines "radicle" as "a rootlet," and then defines "rootlet" as "a radicle." Was that Websterian? A. That is hardly Websterian.

6687 x Q. 530. Was it scholarly? A. No, it is not scholarly.

x Q. 531. Was it slovenly? A. It was slovenly.

x Q. 532. Does it occur in defendant's book that words are spelled differently in the definitions than they are in the vocabulary entries of the same word? A. I don't know.

x Q. 533. Would that be Websterian if it were true? A. Hardly.

6688 x Q. 534. For example, I notice that the word "pundit" is defined as "brahmam," and I notice in the vocabulary that the latter word is spelt "brahmin"? A. Yes. Well, both spellings are correct.

x Q. 535. Is it Websterian to have inconsistent and various spellings with no warning? A. Not to my knowledge at all. That shows I think a different number of men had worked on the thing;

one man doing a certain part and another man doing another part.

x Q. 536. Is the phrase "Adam's ale" a noun? A. Well, now, that is a case. Of course, "ale" is a noun and "Adams" is a noun, but "Adams ale" is a phrase, could only be a noun in the way which I have already illustrated.

x Q. 537. The same would be true of "Adams apple"? A. Now, what most lexicographers would do would be to put down "Adam" and have under "Adam" the word "ale" as a subordinate.

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x Q. 538. Which is the correct way of doing it? A. Yes.

x Q. 539. And it is incorrect to afford the misinformation that a phrase is a noun? A. Yes, but that you will find in a great many dictionaries, the use of phrases as nouns.

x Q. 540. Whatever it may be in other dictionaries it is not Websterian? A. Yes.

6691

x Q. 541. Are the phrases, "improper fraction; inclined plane," nouns? A. No.

x Q. 542. The same is true as to "zymotic diseases"? A. Yes.

x Q. 543. It is an error for Defendant's dictionary to designate that phrase as a noun? A. Well it is not Websterian. I will say that.

x Q. 544. The same thing would be true of "joint stock company"? A. Yes.

6692

x Q. 545. What is the Websterian preferred form of the word "banyan," the name of a tree? A. That I understand to be the preferred form in Webster.

x Q. 546. What is the British form? A. The British form is sometimes that and sometimes "banian," but I think "banyan" with the "y" is the preferable form anyway.

6693

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x Q. 547. In Defendant's dictionary under "banyan" I find "see banian," and under the latter form I find the word defined. That is not Websterian practice? A. No.

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x Q. 548. We have referred to the word "caldron" where the same thing occurred, did we not? A. Yes, only I filed a caveat there that you should not take "caldron" as established by Webster at all. I say that Webster used it, or the Merriam's use it, but the other spelling is just about as common. He did not get all his things in any more than simplified spellers have done.

x Q. 549. What is the Websterian form of spelling the word "despatch"? A. Well, as I remember he spelled it—I am afraid he spelled it "dispatch."

x Q. 550. What is the English form of spelling that word? A. "Despatch."

6695

x Q. 551. What is the form in Defendant's dictionary? A. I cannot tell you, but there I file another caveat to the effect that people generally are very much mixed up on those two words.

x Q. 552. In defendant's book I find this entry "dispatch; same as despatch", and under the latter form I find the word defined. A. Under the form "despatch".

6696

x Q. 553. Is that Websterian usage and practice? A. Well it is not Websterian usage to define a word under the form that it is not preferred under but I think that you can hardly cavil much at that.

x Q. 554. Was not this one of the words upon which Webster laid a special stress as to the form in which it should be spelled? A. Well, if so, he was correct. I don't recollect anything he said about it. That is a difference in English and American usage really.

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6697

x Q. 555. And the defendant in this instance had followed the English usage? A. Yes, but one is as good as another.

x Q. 556. In Webster's introduction which has been offered in evidence as "Defendant's Exhibit B" with Harry Thurston Peck's affidavit, I find under the head "orthography" in paragraph No. 13 on page LVIII. a discussion of the proper spelling of the word "despatch." It would appear then that this defendant's editor had ignored the Websterian views as to that word at least? A. It does so appear.

6698

x Q. 557. What is the Websterian form of spelling the word "cartographer"? A. He spells it "car."

x Q. 558. What is the preferred English spelling of that word? A. "chartographer" but that is also used, the "carto" is undoubtedly the proper form.

6699

x Q. 559. What is the preferred English form? A. The preferred English form if you take the highest authority is "chartographer."

x Q. 560. Which is the preferred form in the Websterian dictionary; the American or the English form? A. I fancy it is the English. There are some things in the matter of spelling that are English.

x Q. 561. Does the Defendant follow the Websterian or the English form of the spelling of the word "fecal"? A. Well, he follows "foecal" I think the diphthong. As a rule Webster knocked out most of the diphthongs where he could and the defendant has not done that.

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x Q. 562. The same thing applies to the word "fetal"? A. Yes.

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x Q. 563. And "fetus" also? A. Yes.

x Q. 564. There are a number of that class of words? A. Yes, that class of word, which were more scientifically spelled with the diphthong and more crudely spelled without, and an officer while he is Websterian I don't think his Websterianism ought to extend to his spelling necessarily. That is, I consider that a minor point only. I think he should be consistent.

6702

x Q. 565. All of those last three words I find entered in Defendant's book as follows: "foal, fetal and fetus" followed by some reference to "faul, faetal and fatus." That is not the Websterian mode of treatment? A. That is not the Websterian orthography, no. It is more correct, though.

6703

x Q. 566. Do you mean to say the Websterian spelling is not at all important in a Websterian Dictionary? A. Why, consistency is always important if a book is Websterian, what you mean by the Websterianism is mainly the definition; but the spelling is also important because it is the schools where these books are used.

x Q. 567. Which is the American or Websterian form of spelling the word "anous"? A. "Anous."

x Q. 568. What is the English form of the same word? A. I don't know a different form from that.

6704

x Q. 569. Is it not "anous"? A. Oh, yes, they do that all through. The English form of "an" is half the time "en" like "enclous" and "enclous"; Webster prefers the "i".

x Q. 570. What form, Webster or English, did the defendant follow in this case? A. If you will tell me I will agree to it. I suppose "anous."

x Q. 571. I find the entry in this book "anous";

Prof. Henry Thornton Fisk—Dr. Hurd.

2753

more so others.¹⁷ A. That is Websterian enough; Websterian Webster always gives the English spelling besides the others.

Q. 372. But in such instances he gives the more treatment under his preferred form of spelling? A. Yes, that is true.

Q. 373. Do you have here many instances of that class which are in Webster's Dictionary? A. No, I have not counted them. I suppose, however, it might be a very large number. Perhaps you can tell me.

2754

Dr. Hurd: I think that is all.

Dr. Hurd's Comments by Dr. Hurd:

Dr. H. Q. 374. These examples taken from Webster's books by consent for comparison, and some of which you have indicated were examples of English spelling preferred to American spelling and were before you, were they not, when you made up your mind as to the rights of this book?

2755

Dr. Hurd: Objected to as preferred and immaterial.

A. Yes. The rights in Webster, you know, you

Dr. H. Q. 375. Did they weigh in your mind against the other witnesses of the rights of the book? A. No, they did not, because witness of the distinction from Dr. Johnson have been often and continuously offered their personal preference to prevail over constitution. You know Dr. Johnson used to make his objections, especially to did not like, or any class of people to did not like, he would rather than to such a day as would make them seriously angry.

2756

Dr. H. Q. 376. Is after that, of those authors

6709

Prof. Harry Thurston Peck—Re-direct.

preferred English spellings found in defendant's book you nevertheless are still of the belief that the book is based on Webster?

MR. HALE: Objected to as irrelevant and immaterial.

6710

A. I am of the belief that more than one hand has worked upon this book; that it was compiled first by someone from Webster's dictionary, that it was altered and revised by someone else who had not consistency in mind and departed somewhat from the Websterian consistency, spelling particularly, the few errors and cross references you find in some of our largest and most important standard works, like the New International Encyclopedia, and the Standard Dictionary, and the Century Dictionary, you find instances in all them showing certain carelessness. In a book, perhaps hastily made, but still a large number of words. It is very natural. I don't think it is any reflection on the book.

6711

Re-D. Q. 577. I understood you to say in cross examination that you would stake your reputation on the statement that this defendant's dictionary is derived from Webster's Dictionary?

MR. HALE: Objected to as incompetent, irrelevant, immaterial and highly improper.

6712

A. Yes. That is, in some way; I don't just say how. But, yes.

Re-D. Q. 578. What do you mean by "in some way?" A. That is to say I don't profess to know whether this compilation was made by an Englishman and then Americanized or whether by an American and then Anglicized.

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6713

Re-D. Q. 579. Do you mean what you have just said. Go on. A. I don't know absolutely whether it came out of Bond's book or whether it was made by Mr. Roe in other words.

Re-D. Q. 580. Have you compared the book carefully with Bond's book? A. Yes.

Re-D. Q. 581. Is it your opinion, that it is based on Bond's book? A. No, it is not my opinion, but it is possible.

R-D. Q. 582. What is your best belief in the matter?

6714

MR. HALE: Objected to as incompetent, irrelevant, immaterial and asking for facts not within the knowledge of the witness.

A. My best belief in the matter, speaking seriously, is that it was compiled by an American and has been subsequently altered and revised also by an American, which accounts for a certain inconsistency in it, but that it was taken directly from the 1847 Webster.

6715

R-D. Q. 583. And it is your best belief that it has no connection whatever with Bond's book? A. That is my best belief, yes.

R-D. Q. 584. I have understood you to say that you considered it as simple as a mathematical sum like adding two and two to discover from the defendant's book and a comparison of it with the 1847 Webster that defendant's book is based on the 1847 Webster?

6716

MR. HALE: Objected to as incompetent, irrelevant, immaterial, as an improper summary of the witness's testimony and as highly objectionable and leading.

6717 *Prof. Harry Thurston Peck—Re-direct.*

R-D. Q. 585. Is that summary exactly correct?

A. Yes.

R-D. Q. 586. This book of Bond's that you speak of, have you compared that with the 1847 Webster? A. No, I compared it with these books, having already compared these with the 1847 Webster.

6718 R-D. Q. 587. When you compared Bond's book with these books, did you have all of the characteristics and the detailed spellings and definitions of Webster's 1847 Dictionary sufficiently in mind to be able to state whether or not the Bond book was largely if not entirely based upon Webster?

6719 MR. HALE: Objected to as incompetent, irrelevant, immaterial, as calling for the contents of a printed book not produced and not subject to comparison and as to which the accuracy of the witness's testimony cannot be tested by cross examination.

6720 A. Yes, I had a very strong impression that Bond's book was not derived from these because it was of a very different character while showing that its original source must have been Webster's source. It was very colorless in its character; that is to say, it was a word-book rather than a semi-encyclopedic book, and furthermore it was differentiated from these by having all the spellings and all the definitions you might say obviously English. There was no trace of Americanism in the book except the fact that it resembled the 1847 Webster; got his words and his definitions so far as they corresponded with English definitions.

R-D. Q. 588. When did you make this com-

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6721

parison of defendant's book with the various small dictionaries and with Webster's 1847? A. In August, September and October of 1911.

R-D. Q. 589. At that time you had no knowledge or information of any litigation such as that in which the testimony is now given? A. I had no definite knowledge about it. I knew that the Merriam Brothers had sued various dictionaries, but there was no concrete definite thing in my mind at all; I did not know any of the people-connected with it.

6722

R-D. Q. 590. Did you make that investigation for the purpose of this suit?

MR. HALE: Objected to as irrelevant and immaterial.

A. No, not in the least.

R-D. Q. 591. You have stated that it is possible that defendant's books may have been based on the Bond's book. If that fact was so would you still say that they are based on Webster?

6723

MR. HALE: Objected to as incompetent, irrelevant, immaterial, as calling for the opinion and conclusion of the witness upon a hypothetical state of facts not shown to exist, and further because the witness's opinion as to possibility is not evidence.

A. Yes.

6724

R-D. Q. 592. Why do you say this? A. Because when marking I read every word in, say twenty pages, taken at random in Bond's, in marking the identities between the 1847 Webster and Bond's, almost every definition, every single word of a definition is identical with the Webster.

6725 *Prof. Harry Thurston Peck—Re-direct.*

MR. HALE: Are you referring now to the Bond book?

THE WITNESS: I am referring now to the Bond book.

R-D. Q. 593. So that anything based on the Bond book is really based on Webster? A. Yes.

6726 R-D. Q. 594. Somewhere in the early part of cross examination you spoke of some advertising which had made the name Webster known. Whose advertising did you refer to?

MR. HALE: Objected to as not properly re-direct, and as incorrectly stating the testimony of the witness upon cross examination.

6727 A. I know positively from observation that a great deal of advertising has been paid for and published in the papers by the Russell's book, which is published by the Saalfeld Company, but more particularly do I know that it is true of the Syndicate Publishing Company, which has often taken whole pages of very important and widely circulated newspapers. They would have to pay a thousand or two thousand dollars for an advertisement, and that is going on week after week and month after month. I suppose they must have spent, and I know they spent, over one million dollars advertising; I know it and I have seen the advertisements and I have seen the man making them.

6728

R-D. Q. 595. In what respect has dictionary scholarship advanced since Webster's time? A. Most of all in the etymology, and more, perhaps as much, in the thread and scope of the vocabulary. For example, the Webster of 1828, that bulky book, had only twelve thousand words in

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6729

it as a vocabulary. One of these books, my book, the New Websterian, has thirty-five thousand. And I will give as an example the Standard Dictionary, the Century Dictionary, and this great dictionary that is being prepared in England, the object being to get in all the words in the language, good, bad, low, high and of every degree.

R-D. Q. 596. Changes in etymology would not of course appear in an abridged dictionary at all, would they? A. No. They might. Etymological changes, you mean. No, they would not come into an abridged dictionary. You might find classes of words, with an indication of their origin, whether Latin or French, or Spanish or something of that sort, but the great changes of etymology subsequent to 1870 would appear only in an unabridged dictionary; there would not be anything about them in an abridged dictionary; in an abridged dictionary the readers would not be able to understand them.

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R-D. Q. 597. On cross examination you stated that you somewhat preferred the title Websterian to the title Webster. Does that preference apply as a title upon the Merriam books, as well as for defendant's books?

22

MR. HALE: Objected to as irrelevant and immaterial.

A. You mean that I think the Merriam books—if I were one of their editors I would advocate changing it to Websterian? I did not quite get the drift of that question.

6732

R-D. Q. 598. (Question repeated)? A. Why, yes; that is to say, if I had to choose a title I would choose "Websterian" rather than "Web-

6733

Prof. Harry Thurston Peck—Re-cross.

ster's," because there are no longer any Webster's books in the strict sense.

R-D. Q. 599. Do you consider the special cases picked out by Mr. Hale from Exhibit C— A. (Interposing.) Of the vertical bar—

R-D. Q. 600. —as fairly representative of that exhibit? A. I think they are grossly unfair.

6734

MR. CARROLL: Defendant's counsel, because of the lateness of the hour, and because he considers properly that the exhibit speaks for itself, does not request the witness to select any examples which he considers more representative.

RE-CROSS EXAMINATION by Mr. Hale:

6735

R-x Q. 601. You stated just a moment ago that there are no longer any Webster's Dictionaries in the strict sense. Just what did you mean by that? A. I meant made by Webster himself.

R-x Q. 602. You stated that you have seen men making advertisements of Webster's Dictionary. To whom did you refer? A. Yes. You mean the Syndicate Publishing Company's Book? Yes.

R-x Q. 603. Where did you see them making those advertisements?

6736

MR. CARROLL: Objected to as incompetent, irrelevant, immaterial and not within the knowledge of this witness, and as hearsay.

A. They had a special room for the man that has the making of the advertisements, that is drawing the posters and that sort of thing to be put in the newspapers, and introducing them in the office of the Syndicate Publishing Company.

R-x Q. 604. Who did you see making them; em-

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6737

ployees of the Syndicate Publishing Company?

A. Yes, and as to my knowing about what they were, I can read.

R-x Q. 605. You referred to advertisements of Russell's book. Do you mean the book— A. There is a larger Russell's book of which I don't know the name, larger than this, but it is one of the Saalfield books; it is a very good book, too, of its kind.

6738

R-x Q. 606. Do you know that Saalfield is the defendant in a suit? A. No; I don't know anything about Saalfield at all.

R-x Q. 607. You do not know then that the Circuit Court of Appeals in the Sixth District has directed an injunction against Saalfield because of his manner of using the name of Webster's upon his books and advertisements? A. I never heard it. I did not know that he had any litigation at all; I only knew him by this little Webster here.

6739

R-x Q. 608. Did you actually compare the book which we have referred to as the Bond book with the Webster 1847 edition? A. No, I said that I compared it—with the two books in question, in the suit, after having compared them with Webster's, but immediately after, so that Webster was very fresh in my mind, and then I further answered, if you recollect that I had a certain opinion about the Bond book. That is on the record.

6740

R-x Q. 609. You stated that you believed Defendant's book had no connection with the Bond book. Was that belief based upon the differences or the similarities which you observed between them? A. Based on the differences, rather on the inherent improbability that they would go to work and take the Bond book and do all the work

6741 *Prof. Harry Thurston Peck—Re-cross.*

necessary to Americanize it, when they could go straight to Webster and make their own abridgement.

6742 R-x Q. 610. Which do you think is the safest basis for an opinion in the comparison of two books; the differences or the similarity which existed between them? A. That raises a great old philosophical question. I won't discuss it though, but it raises the question of analogy and anomaly. Let me think a moment to see whether I am an anomalist or an analogist. I think it all depends on the amount of difference or resemblance; for example, if a book had ninety percent like Webster and ten percent otherwise, I would say it was taken immediately from Webster's. If it was fifty percent Webster's and fifty percent not Webster, I would say that Webster did not necessarily claim much part in it, but it was properly taken from some other source, and used in connection perhaps with Webster.

6743 R-x Q. 611. And if there was a common source from which the similar or identical matter could have been derived, but all the differences were followed, then upon what would you base your opinion; the similarities or the differences? A. That is as to two books?

6744 R-x Q. 612. Yes? A. I would decide it rather by the similarities. You take an example, the Bond book, I answered that question really, it is the dissimilarity in the Bond book that makes me think that that is not a common source for the others.

R-x Q. 613. If, for example, the Bond book contained many departures and variations from Webster's book, as well as many similarities, and the Defendant's book in addition to having the com-

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6745

mon similarities also followed many or the great majority of the variations in the Bond book, would you say then that in your opinion it had been based upon the Bond book? A. I should, but such is not the case.

R-x Q. 614. That remains to be seen when we are able to find and produce the book called the Bond book? A. Yes, I say that provisionally of course, but I have gone all through the Bond book, and I know what I am saying. You will find the same thing.

6746

MR. HALE: Defendant is called upon to produce a copy of the book referred to as the Bond book, which this witness has testified was placed in the possession of someone connected with the Defendant.

THE WITNESS: Make it a little more distinct and say "sold in this City by Charles Scribner's Sons."

6747

MR. HALE: That is all.

MR. CARROLL: That is all.

DEPOSITION CLOSED.

(Signature of witness waived by consent.)

(Further hearing adjourned to Friday, June 21st, 1912, at 11:00 A. M.)

6748

6749

Joseph J. Little—Direct.

NEW YORK, Friday, June 21st, 1912,

11 o'clock A. M.

Met pursuant to adjournment.

Present: Counsel as before.

6750 Adjourned to Tuesday, June 25th, 1912, at
11 A. M.

Met pursuant to adjournment.

Present: Counsel as before.

JOSEPH J. LITTLE, a witness called by and on behalf of the defendants, having been first duly cautioned and sworn, testified as follows:

6751

DIRECT EXAMINATION by Mr. Carroll:

Q. 1. State your full name, please? A. Joseph J. Little.

Q. 2. Age? A. 71.

Q. 3. Residence? A. 47 West 68th Street.

Q. 4. And occupation? A. Printing and binding.

Q. 5. What company are you now connected with? A. J. J. Little & Ives Company.

6752 Q. 6. What is the address of that company?
A. 425 to 435 East 25th Street.

Q. 7. What is your connection with that company? A. I am president and treasurer.

Q. 8. Have you ever been connected with the Commission of Education in this city? A. I was a member of the Board of Education.

Joseph J. Little—Direct.

6753

Q. 9. Were you connected with the Board of Education in any other capacity? A. Than that?

Q. 10. Than simply member? A. I think you will have to make yourself a little clearer than that. All members serve committees or are officers or something of that sort.

Q. 11. Now, have you been president of the Board of Education? A. I have, of the City of New York, the greater city, since consolidation.

6754

MR. HALE: Would you mind putting in the date and the year?

THE WITNESS: 1899, 1900 and 1901, I think.

Q. 12. What does the term "Webster's dictionary" mean to you? Well, it means a book that is authority for spelling and so on.

Q. 13. Is it connected in your mind with any particular publisher? A. No, sir; there are quite a number of Webster's dictionaries in the market.

6755

Q. 14. What do you consider the most important basis of all of the Webster's dictionaries now on the market?

MR. HALE: Objected to as incompetent, irrelevant and immaterial, and as calling for a mere conclusion of the witness.

A. I do not think I could answer that question.

MR. CARROLL: Read the question again. It calls for what you consider.

6756

(Question repeated.)

Q. 15. What do you consider the most important basis of all of the Webster's dictionaries now on the market?

MR. HALE: Objection repeated.

Joseph L. Little—Witness.

A. They are all different more or less; therefore I do not see how I can give an answer as to the most important of all of them.

Q. 16. What right do any of them have to the name of "Webster's?"

Mr. Hays: Objected to as incompetent, irrelevant and immaterial, as calling for the opinion and conclusion of the witness upon a question of law, and also as calling for matter not shown to be within the knowledge of the witness.

A. I understand that Noah Webster died many years ago—who wrote the dictionary—and its copyright has long since expired. Since that time many publishers have issued dictionaries, using largely from Webster's dictionary on which the copyright expired, but bringing it down to date, to the date of publication; using other words as being it down. You know that words being added constantly, those are words must appear in a dictionary to be of any value.

Q. 17. How did the Board of Education select dictionaries when you were connected with it? A. I do not think I was on that committee.

Q. 18. Nevertheless, as president of the Board, you had knowledge of it, did you not? A. I know there were several dictionaries put on the list. I think probably given but something to the effect of,

Q. 19. Did you have the method of selecting the dictionaries? A. Yes; there was a system of selecting all the best books in the nation; publishers were asked to submit lists for books, and the prices at which they were to furnish them to the Board, as called for by the Board during the year. Then the publishers offered any books that

they would be... as might be expected in writing, spelling and so on, and that this was rather like those even and faulty details which they will be put on the list. Then the principle of every school here is right in which any teacher from the list that is made up, they are not supposed to take any particular note, they might as well from the list as submitted by the Board.

From Worcester by Mr. Hille.

Q. 20. How long have you been aware of the similarity with Webster's dictionary? A. A great many years, probably 30.

Q. 21. What has been the reputation and standing of that book during that period as an authoritative dictionary for American use? A. Well, for a good many years that was Worcester's was the standard. A great many authors preferred, as long as I can remember the Worcester's, and a great many preferred the Webster's.

Q. 22. And what is the relative standing of those two books today, if you know? A. Well, I think the Webster's dictionary is more popular than the Worcester's. Worcester was never perfect. Henry Hall & Company and myself and one or two others talked over of having that and getting it, but it never came to a head.

Q. 23. What was the greatest and greatest of the American dictionary, in comparison to the Worcester dictionary? A. I did not refer to any publisher.

Q. 24. I see, who has been the publisher of the Webster dictionary in which you referred in comparison to the Worcester dictionary? A. I do not think that was the way you asked.

6765

Joseph J. Little—Cross.

x Q. 25. That is the way I meant it. A. There have been many publishers.

x Q. 26. Name them? A. Well, Success Company published one; Ogilvie Company published one I am rather off on names. The company that this gentleman (referring to Mr. Carroll) represents published one.

6766

MR. CARROLL: The Syndicate Publishing Company, and Cupples & Leon.

THE WITNESS: There are others, but I do not recall them at this time.

x Q. 27. Did you ever hear of the Merriam Company? A. Yes, sir.

x Q. 28. Why didn't you mention their names? A. I have mentioned those that came to mind; I do remember it very well.

6767

x Q. 29. Do you not know that the dictionary which you say was published by Success Company was one of the Ogilvie dictionaries, and was merely used by the Success Company as a premium? A. I don't know it was published the same as the Ogilvie.

x Q. 30. You knew it was the premium book, however? A. I knew it was used as the premium.

x Q. 31. And don't you know that it was the Webster's Intercollegiate Dictionary copyrighted by Ogilvie? A. I didn't know that.

6768

x Q. 32. I presume you do not know that the Ogilvie books, including the book handled by the Success Company, are in litigation in the Sixth Circuit, and that an injunction against them has been directed? A. I do not.

x Q. 33. Did you ever hear anything on that subject? A. Well, I have heard there has been more or less litigation.

MR. CARROLL: I object to that question and answer and move that both be stricken out as incorrectly stating the facts.

x Q. 34. Will you please repeat again your view as to the right to use the name "Webster" upon dictionaries in the market to-day, to which you referred upon your direct examination? A. I do not think I commented upon any right of anybody.

x Q. 35. Mr. Carroll asked you as to the basis upon which the name "Webster" was used in the title of various dictionaries now on the market. A. I will ask to have my answer read.

6770

x Q. 36. I would like to have a re-statement of it in your own words, now, please? A. My understanding then was this:

Noah Webster originally compiled or wrote, as you choose to term it, a dictionary, and that copyright expired many years ago, and he is also dead, and any Webster dictionary published now containing later words and authorities, must naturally and necessarily be written by someone different from Noah Webster, and it is more or less a fiction to call it Webster's dictionary.

6771

x Q. 37. Is it your opinion that in order to be properly called a Webster's dictionary to-day, the book must contain some part of the matter contained in a dictionary written by Noah Webster? A. Yes, I should think so.

x Q. 38. And must be based upon that rather than upon some other lexicographer's work? A. Partially upon that, certainly.

6772

x Q. 39. And you do not think it would be proper to call a book Webster's dictionary to-day that had no connection with any of the books in the series of Webster's dictionaries? A. Not if that calling that name meant it was Noah Web-

6773

Joseph J. Little—Cross.

ster's, unless there are other Websters in the world; I say I would not think it proper to publish a dictionary giving the public the idea it was Noah Webster's, if it did not contain any part of what was in the original Noah Webster's dictionary.

6774

x Q. 40. Would you think it proper for a publisher to republish an English dictionary compiled by some Englishman, and change its name and call it the Webster's for American use? A. I have already answered that if it did not contain any of the Webster's words I would not think it was proper, unless the Englishman's name was Webster.

6775

x Q. 41. When you say in fact there are quite a number of Webster dictionaries on the market, do you mean to say that there are a number of dictionaries using the name "Webster" in the title upon those published by various publishers? Is that the whole of your meaning in that answer? A. I think it is substantially, but I think it also has a deeper meaning, as I have tried to explain. It is based on the Websterian principles originally laid down by him.

6776

x Q. 42. I presume you do not mean to say whether in any particular instance or in connection with any particular dictionary the name "Webster" has been properly used? A. I do not pass judgment on that at all.

x Q. 43. You have stated that several dictionaries were put on the list of approved books by the New York City Board of Education: What were those dictionaries by name, please? A. I do not think I can name them all. I think the Standard dictionary was put on. I think one or two different Webster's dictionaries were put on—

possibly three. I think Worcester's dictionary was put on, and I think the Century dictionary was put on.

x Q. 44. Do you know the name of the publisher of the Webster's dictionaries which were thus approved for use in the New York schools? A. I do not. I do not know either the name of the publishers of the Worcester.

x Q. 45. Have you any reason to believe that the Webster's dictionaries thus approved were in fact the dictionaries published by the G. & C. Merriam Company? A. I shouldn't be surprised of that, if I had that called to my attention.

6778

x Q. 46. Commissioner Draper, the commissioner of Education in this state, or in the State of New York, has testified in this case that the Merriam Webster's dictionaries are the only Webster's dictionaries approved for school use by the state authorities. With that information, are you able to state whether or not the books approved by the New York City Board of Education were the books published by the Merriam Company?

6779

MR. CARROLL: I object to that question on the ground that Mr. Draper has not so testified.

A. In the first place, Mr. Draper has not been always Superintendent of Schools in New York; he only came in towards the end of my term. Charles R. Skinner was the State Superintendent during a large part of my service.

6780

x Q. 47. I was merely trying to refresh your recollection. If it does not help, why, no matter.

A. I am trying to give you the facts as they were.

x Q. 48. It does not refresh your recollection then upon that subject? A. Upon what?

Joseph J. Little—Cross.

6781

x Q. 49. Upon whether or not the Merriams were the publishers of the Webster's dictionaries approved for use in the Schools of the City of New York? A. I do not see that that has any connection about it; the New York School Board of Education is an independent board, buy their own books, and the City pays for them. The state does not pay for them at all. The New York City Board of Education does not have to submit the question of the books they are to use to the State Superintendent.

6782

x Q. 50. Do you know of the American Book Company as the publishers of Webster's dictionaries? A. No, I do not; I would not be surprised if they were, but I don't know it.

x Q. 51. Have you ever heard or seen the name of the American Book Company upon school abridgements of Webster's dictionaries? A. I do not think so.

6783

x Q. 52. You do not remember it, if you did? A. No, I don't remember it.

x Q. 53. In making up this list of approved books of all sorts by the Board of Education, did literary excellence have anything to do with the approval of the Board? A. Oh, yes, sir.

x Q. 54. The matter of price then was not the controlling consideration? A. Not wholly controlling.

6784

x Q. 55. The board would not approve an inaccurate book without any literary excellence merely because its price was cheap? A. Not at all, but it did frequently happen that two or three or even more publishers would offer the same book exactly at different prices. I am not speaking now of dictionaries.

x Q. 56. Are you the Mr. Joseph J. Little who

made an affidavit on behalf of the defendant in this case? A. I did make an affidavit.

x Q. 57. In this affidavit I find the following statement: "I am familiar with the following facts, viz: That Noah Webster died in 1843; that the Webster dictionary unabridged published in 1847 by G. & C. Merriam was prepared under the direction and supervision of Chauncey Goodrich, and that Webster's unabridged dictionary published in 1864 by G. & C. Merriam was prepared under the direction and supervision of Noah Porter." Is that statement correct? A. Yes, sir.

6786

x Q. 58. Which one of those books, if you know, was the book which was involved in the controversy with Worcester's dictionary some forty odd years ago? A. I don't know.

x Q. 59. You don't know anything about that controversy? A. No.

6787

x Q. 60. I am speaking now of a literary controversy among scholars and users of dictionaries as to which was the best dictionary, and not to any legal controversy? A. I don't remember; I know there was such a discussion, but I don't remember anything about its details, or who was involved or who were the disputants.

x Q. 61. But do you remember what were the books? A. It has passed from my memory.

x Q. 62. It was simply Worcester's dictionary on one hand and Webster's dictionary on the other as you now remember it? A. Yes. The question involved, as I remember it, was one of scholarship, but it is so long ago, it is entirely out of my memory.

6788

x Q. 63. Was it also somewhat a question as to whether the innovations or changes which

Joseph J. Little—Cross.

6789

Noah Webster wished to introduce should be accepted and followed to the extent that he desired to go? A. I don't remember.

x Q. 64. Are you at all familiar with a book known by the name of the "Crown dictionary"?

A. No, I am not.

x Q. 65. Never heard of it? A. Does that refer to the shape or to the entirely different authorship?

6790

x Q. 66. The name refers to the title of a book, a book published under the name of the Crown dictionary? A. No, I don't know it.

x Q. 67. You never heard of it? A. No.

x Q. 68. Is Edwin S. Ives a member of your company? A. Yes, sir.

x Q. 69. Were you a member of that company in or about the year 1904? A. No, that company did not exist at that time.

6791

x Q. 70. Were you a member of the concern of J. J. Little & Company, printers and bookbinders in the year 1904? A. I was.

x Q. 71. Do you remember anything about printing an edition of a book called the Crown dictionary at about that time? A. I don't remember it.

6792

x Q. 72. You do not remember anything about it at all? A. No; I don't know that I ever heard that name before you mentioned it, though I may have; we are preparing thousands of books right along.

x Q. 73. You have no knowledge or information whatever then as to a book called the Crown dictionary having been either printed or bound by the firm of J. J. Little & Company in or about the year 1904? A. I have no knowledge of it at all.

x Q. 74. Have you any information? A. No.

Joseph J. Little—Re-direct.

6793

x Q. 75. Have you discussed that matter with Mr. Edwin S. Ives at all? A. No, sir.

x Q. 76. At any time? A. Not that I recollect; I have said plainly that I do not remember having heard that name Crown before you mentioned it, though I added I may have, for we are printing hundreds and thousands of different books all the time; I cannot keep them in my mind.

x Q. 77. Do you remember anything about printing or binding a dictionary for Louis Klopsch, of the Christian Herald, in or about the year 1904? A. I know we printed books for Louis Klopsch, but I do not remember that title.

6794

x Q. 78. You do not remember anything about the details of a dictionary job? A. I do not.

x Q. 79. Done at that time? A. I do not. I have just thought of another dictionary that we print, and I think that is on the school list too, but I am not positive of it; the Clarendon dictionary, published by the University publishers.

6795

RE-DIRECT EXAMINATION by Mr. Carroll:

R-D. Q. 80. Mr. Hale has quoted to you from an affidavit which you made in this case. I also read from that affidavit—

MR. HALE: I object to counsel leading his own witness in that manner.

R-D. Q. 81. (Continued). "Since 1889 numerous editions of Webster's dictionaries, both complete and abridged, have been published by various houses. If based upon the work of Noah Webster, revised and brought up to date, they are as genuine as any Webster's dictionary published since the death of Noah Webster can be." Does that still represent your views?

6796

6797

Joseph J. Little—Re-direct.

MR. HALE: Objected to as incompetent, irrelevant and immaterial, and as leading.

A. It still represents my views.

R-D. Q. 82. I quote further from said affidavit—

6798

MR. HALE: Objection and protest is made against this incompetent and improper manner of examining counsel's own witness, and the further objection as not proper re-direct examination.

6799

MR. CARROLL: No mention was made of this affidavit by counsel for defendants in his direct testimony. The question of the affidavit was brought up for the first time in the cross examination and parts of it were quoted which appeared to counsel for complaint as favorable to his case. Counsel for defendant therefore deems it necessary to quote further parts, in order that the Court may not be under a misapprehension as to the contents of said affidavit.

6800

MR. HALE: The affidavit was admissible on cross examination, either to refresh the witness' memory, or to contradict his testimony, and it was used solely for that purpose. It is not competent for counsel with his own witness on the stand to read into the record the ex-parte affidavit of that witness.

R-D. Q. 83. (Continued). "The name Webster as applied to dictionaries is in such general use, and covers such a wide range in size of books, that any citation using merely the words 'Webster's dictionary' would be incomplete; to be complete it should contain the full title of the dic-

Joseph J. Little—Re-cross.

6801

tionary from which citation is taken." Does that represent your views?

MR. HALE: Objected to as incompetent, irrelevant and immaterial, as leading, and as not proper re-direct examination.

Objected to further as calling merely for an opinion of the witness.

A. It does.

6802

R-D. Q. 84. You have stated on direct and cross examination that in making this selection of books or dictionaries, the Board of Education took into consideration literary excellence, and also price. Did the question of who published the books or dictionaries enter into the dispute at all?

MR. HALE: Objected to as incompetent, irrelevant and immaterial.

6803

A. Before I answer that I should like to ask a question of what you mean by publishers. Would the sale of the book constitute publishing in your mind?

R-D. Q. 85. This question contemplates as the definition of the word "publisher," the house from which the work originates? A. I do not think the Board of Education would take any cognizance of that if they can get the same book at a lower price from another.

6804

RE-CROSS EXAMINATION by Mr. Hale:

R-x Q. 86. In other words, it is the identity of the book, and not the identity of the publisher of it, that is considered by the Board? A. Yes; in connection with the price. For instance, if the American Book Company would sell a book pub-

6805

Joseph J. Little—Re-cross.

lished by the D. Appleton Company cheaper than D. Appleton & Company would publish it themselves, they would buy that book through the American Book Company because it would be cheaper.

R-x Q. 87. Is this affidavit to which reference has been made wholly in your own language? A. It represents my language and view of the situation.

6806

R-x Q. 88. Who drew it up and embodied it in the form in which it appears? A. I did that after consultation.

R-x Q. 89. You did not write out any part of it yourself? A. I dictated certain parts of it myself. In the first place I gave my views, and from that then that was put on paper, and submitted to me, and I corrected it accordingly to make it more exact with my views, and then written by the person who wrote it down.

6807

By Mr. Carroll:

R-R-D. Q. 90. As between two Webster's dictionaries, which were not identical, which were of equal literary excellence, would it enter into the discussion in choosing between them who was the publisher of either? A. How it would be decided—you rather beg the question there. You say were of equal value. I think you should say if in the judgment of the committee they were of equal value.

6808

R-R-D. Q. 91. I accept the amendment to the question as stated. A. Now, as amended let me hear what the question is.

MR. CARROLL: I withdraw that question, and the question as amended is re-read to the witness as follows:

Joseph J. Little—Re-cross.

6809

R-R-D. Q. 92. As between two Webster's dictionaries, which were not identical, but which were of equal literary excellence, in the judgment of the Purchasing Committee of the Board of Education, would it enter into the discussion in choosing between them who was the publisher of either? A. I do not think it would.

Deposition closed.

Signature of witness waived by consent.

6810

MR. HALE: Complainant's counsel inquires whether defendant's counsel is now ready to produce the books referred to by the witness Peck as the "Bond dictionary," as complainant would like an opportunity to inspect the same.

MR. CARROLL: Counsel for defendant has not been able to find said book, and is still making an effort to do so.

6811

Notice is hereby given that on Friday, June 28th, the testimony will be taken in Springfield at the office of the Special Examiner, John J. Jennings, at 11:30 in the forenoon.

Adjourned to Wednesday, June 26, 1912,
at 2 o'clock P. M.

6812

6813

Albert L. Swift—Direct.

Wednesday June 26th, 1912.

2:00 P. M.

Met pursuant to adjournment.

Present: Mr. Hale and Mr. Carroll.

ALBERT L. SWIFT, recalled as a witness on behalf of the defendant, testified as follows:

6814

DIRECT EXAMINATION by Mr. Carroll:

Q. 1. Harry Picket, one of the witnesses called on behalf of Complainant, testified that on December 8th, 1911, he saw an advertisement in the New York American for a dictionary and that on December 9th, having cut coupons from the New York American, as directed by the advertisement, he purchased a dictionary from one of the American distributing agencies. He further stated that the clerk from whom he purchased the book answered that he supposed it was a genuine one and an original one. I show you an advertisement and ask you if you can identify that as an advertisement cut from the New York American of December 8th, 1911? A. Yes.

6815

Q. 2. Can you state whether or not that was the advertisement which was seen by Mr. Harry Picket? A. That was the first ad of the Fall campaign.

6816

Q. 3. Does this advertisement contain the statement that the dictionary is not published by the original publishers of Webster's dictionary or by their successors.

MR. HALE: Objected to as secondary, the advertisement speaking for itself.

Albert L. Swift—Direct.

6817

A. Yes.

Q. 4. I show you also pages cut from the following newspapers, Newark, New Jersey Star, of October 20th; Springfield, Mass., Union, October 21st; Buffalo Evening News, October 21st; Grand Rapids Press of November 6th; Toledo Daily Blade of October 1st; Baltimore American of October 22nd; Flint Michigan Daily Journal of November 6th; the St. Paul Pioneer Press of October 26th; the Springfield Union of October 28th; the Milwaukee Evening Wisconsin of November 13th; the Wichita Beacon of October 30th; the Baltimore American of October 31st; the Manchester Union of November 7th; the Muscatine Iowa Journal of October 30th; the New Bedford Times of October 22nd; the Easton, Pennsylvania, Daily Argus of October 27th; Charlotte, North Carolina, Daily Observer of October 31st; Kansas City Journal of November 3rd; Houston, Texas, Chronicle of November 12th; Saginaw, Michigan, Courier Herald of November 14th; Lincoln, Nebraska, Daily Star of November 7th; Parsons, Kansas, Daily Sun November 7th and the Omaha Daily News of November 13th, and ask you if those are all advertisements inserted by the newspapers in connection with the campaign of the Webster's illustrated or New Standard Dictionary? A. Yes.

6818

6819

Q. 5. Does each one of these papers contain the notice "This dictionary is not published by the original publishers of Webster's dictionaries or by their successors"?

6820

MR. HALE: Objected to as secondary; the advertisements speak for themselves.

6821

Albert L. Swift—Direct.

A. Yes.

MR. CARROLL: These advertisements together with the one from the New York American before referred to, were filed in connection with the affidavit of James F. Johnson in opposition to the motion for a preliminary injunction, and are now offered in evidence for final hearing.

6822

(These advertisements, together with others, bound in one book, are marked Defendant's Exhibits, Newspaper Advertisements, June 26th, 1912, JAS., Exr.)

Q. 6. Did the newspapers which were handling this plan from time to time receive letters from purchasers of Webster's New Standard Dictionary or of Webster's New Illustrated Dictionary commenting upon the dictionaries? A. Yes.

6823

Q. 7. I show you eleven letters and ask you if those are letters received by the newspaper to which they are addressed in connection with the newspaper campaigns?

MR. HALE: Objected to as incompetent, irrelevant and immaterial and as calling for matter not within the knowledge of this witness.

A. Yes, sir.

6824

Q. 8. How do you know that these are such letters? A. Some of them I received myself at the office of the newspapers when they came in, and the others I identify as having been received by me from the papers, to incorporate in their advertising.

MR. CARROLL: I offer these letters in evidence.

Albert L. Swift—Direct.

6825

MR. HALE: They are objected to as incompetent, irrelevant and immaterial, and as to those letters not received by the witness himself, as stated, the previous objection is renewed, that it is matter not within the knowledge of this witness; and further because relating merely to the merits or qualities of the book, which are directly in issue, and because the letters are not competent evidence as to the facts recited therein.

6826

(Subject to this objection they are by stipulation copied at length into the record, and read as follows):

“LOCKPORT, N. Y., Nov. 6, 1911.

Circulation Department,
The Evening News,
Buffalo, N. Y.

6827

Gentlemen.—Permit me to add my testimonial to the qualities of the Webster Dictionaries that you have just concluded offering at special rates. Although watching your ‘ad’ from the first insertion it was not until the last day in the afternoon that I availed myself of the opportunity to make a purchase of the \$4.00 book.

I deem the work, of its character, about as near the acme of literary genius as can be attained. It is so replete with excellent features that I find it extremely difficult to commend a single one as against another. The book should be in every home, particularly where wealth forbids the purchase of a variety of books. The updateness makes it particularly valuable to the youth just entering his educational career. The only pos-

6828

6829

Albert L. Swift—Direct.

sible criticism that could be made is the absence of a thumb index, but I'm sure anyone would overlook that when estimating its value along other lines.

Wishing you continued success, assuring you that I am thoroughly pleased and that you have made possible the step over the gap to an educative accomplishment for more than one person, I beg to remain,

6830

Very sincerely,
H. C. TOWNSEND."

"St. Louis, Post-Dispatch.
St. Louis.

Dear Sirs.—We received the Dictionary very promptly and are more than pleased.

6831 First and foremost on account of the "New and Unusual Words" with their "Up-to-date Definitions."

We are also pleased with its "Handy Size," "Beautiful Binding," "Clear Type," "Splendid Paper," "Synonyms and Antonyms," and the "Commercial and Legal Terms."

We cannot see what more could be asked in the shape of a handy Dictionary.

6832 We sincerely thank you for our copy feeling that it is worth many times its cost to us.

Gratefully,
A. J. MILLS,
Carrollton, Illinois,
R. F. D. No. 3.
October 5th, 1911."

Albert L. Swift—Direct.

6833

"October 4th, 1911.

Post Dispatch,
St. Louis, Mo.

Gentlemen:

I received to-day the New Standard Dictionary ordered Sept. 30th, and am well pleased with same. It is all that you represent it to be.

6834

Yours truly,
R. J. ABERNATHY."

"Crocker, Mo., October 2nd, 1911.

St. Louis Post-Dispatch.

Dear Sirs:

I Rec. Dictionary all O. K. It is fine. Would not take five dollars for mine if I could not secure another. Many thanks for prompt reply.

6835

Yours truly,
DR. A. J. WOODIN."

"Unionville, Md., Mar. 12, 1911.

Baltimore American,
Baltimore, Md.

Gentlemen:

6836

I wish to thank you for the handsome dictionary just received for \$1.20. It is far beyond my expectations. I think I appreciate most the new words and full definitions. In the old dictionaries so often I was unable to find new words and their meanings.

Yours truly,
EDGAR A. MORRIS."

6837

Albert L. Swift—Direct.

"Romney, W. Va., Oct 17, 1911.

The Circulating Department,
Baltimore American,
Baltimore, Md.

Gentlemen:

6838

Having seen a copy of the \$4 Webster's New Standard Dictionary in the hands of another, I was so much pleased that I immediately applied for one, and the same has just been received.

The feature of it which appeals to me especially is the immense fund of useful information in so compact and convenient a form. It now fills a space on my desk to my entire satisfaction; and I am quite sure I would not accept \$4 for it, if I could not procure another.

Yours very truly,

6839

WM. N. BAIRD, Mgr."

"Albion, N. Y., 11/6/1911.

Circulation Dept. of 'The Buffalo Evening News,'
Buffalo, N. Y.

6840

For the small sum of ninety-eight cents I have received a copy of 'Webster's New Standard Dictionary.' It is impossible to specify any one of its many valuable features, as the whole is so beautiful and contains so much more information than one could reasonably expect for the trifle asked for it. I am pleased with it and greatly appreciate the favor of receiving so much for almost nothing.

Respectfully yours,

L. A. MARKHAM."

Albert L. Swift—Direct.

6841

“Associate Congregational Church,
Baltimore.

General Felix Angus.

Dear Sir:

Allow me to congratulate the *Baltimore American* and the *Baltimore Star* on the great opportunity that they are giving the people of Baltimore in the remarkable offer of the New Standard handy volume of the *Webster Dictionary*. This is not merely fine business advertisement; it is also public philanthropy, such as every citizen should appreciate. I have just secured two copies for my boys, and am astonished at the wonderful volumes that they are for the money. *It is almost unbelievable that so much can be given for so little.* I wish every family in Baltimore, and especially every school child, could have a copy. With its illustration, and extra matter, it is *a liberal education in itself.*

6842

6843

With best regards,

Very Sincerely Yours,

12 September, 1911.

OLIVER HUCKEL.”

“Clifton Forge, Va.,
November 12, '11.

The Circulation Dept.,
Balto. American,
Balto., Md.

6844

Gentlemen:

I rec'd the “Websters New Standard Dictionary Sept. 10th, 11, and since then it has been in

6845

Albert L. Swift—Direct.

constant use by some one in the family, and the best I can say of this book is the unusual interest my son has taken in it who is 14 years of age and going to school. I gave it to him, and he has said often he would not sell it for \$10.00. He also said he got more and quicker information out of it than all my other Dictionarys and encyclopedias of which I own several.

6846

Every parent, who has children going to school, ought to have this book in the house; it will pay for itself many times in Mental thought alone.

Very Truly Yours,
LOUIS F. WOLFES."

No. 345 R'way St.,
Clifton Forge, Va.

"Washington College,
Chesterton, Md.,

6847

Oct. 17, 1911.

The Baltimore American,
Baltimore, Md.

Dear Sirs:

6848

I beg to acknowledge the receipt of your dictionary which I sent for a few days ago, and after looking it over I am frank to admit that it is the cheapest book that I ever bought in my life. It is surely worth three times its cost without any exaggeration whatever. I thank you many times over for your kindness. I find it very useful indeed.

Shall not forget to spread abroad your merits.

Very sincerely yours,
OLLIE H. CONNELLY."

Albert L. Swift—Direct.

6849

“Pungoteague, Va.,

Oct. 26, 1911.

The Baltimore American,
Baltimore, Md.,

Gentlemen:

I have just received the copy of Webster's New Standard Dictionary in flexible leather binding, through the coupon offer in your paper. I am amazed at its beauty and comprehensiveness. It is well worth the value you claim for it—\$4.00, and I thank you cordially for the offer which gives it to your subscribers at the absurdly low price of 98c. 6850

Sincerely yours,

NELL BATAILLE HIDEN.

(Mrs. J. H. Hiden).”

Q. 9. Are these all of the letters so received by the newspapers? A. No, sir. 6851

Q. 10. Are they a large part of the letters received by the newspapers? A. No; a very immaterial part of the letters so received.

Q. 11. Are they typical of the letters so received? A. Yes.

Q. 12. Where they picked at random from those received by the newspapers? A. Yes.

Q. 13. I show you three pages cut from newspapers as follows: from the Buffalo Evening News, October 16th, 1911; from the St. Louis Post Dispatch, October 22nd, 1911; from the Baltimore American, October 26th, 1911, and ask you if those advertisements all refer to the book of the defendant, the Syndicate Publishing Company? A. Yes. 6852

6853

Albert L. Swift—Direct.

Q. 14. Does each one of those advertisements contain the statement "This dictionary is not published by the original publishers of Webster's Dictionary, or by their successors?" A. Yes.

MR. CARROLL: I offer these in evidence; and they are included in the bound volume of newspaper exhibits.

6854

Q. 15. I call your attention in these advertisements to certain letters which are set forth at length thereon. Do you know of your own knowledge whether or not those letters were actually received by the newspapers as stated in the advertisements? A. A portion of them I do.

6855

Q. 16. What portion do you mean? A. The Post Dispatch; those that are in the Buffalo Evening News and in the Baltimore American were sent to me by the publishers of those papers to be incorporated into an advertisement for them, as letters having been received by them.

Q. 17. Then you actually saw the original of each one of the letters contained in these advertisements? A. Yes.

6856

MR. HALE: The contents of the published letters referred to are objected to as incompetent, irrelevant and immaterial and not properly identified, the witness saying that he has merely hearsay information upon the subject, and further because the letters are not competent evidence of the truth of the facts recited therein.

Q. 18. Did you have in your employ a man named Murphy? A. Yes.

Q. 19. What was this man's full name? A. J. F.

Albert L. Swift—Direct.

6857

Q. 20. When did you have him in your employ?

A. In the Spring of 1911.

Q. 21. On what business was he engaged? A. On our dictionary work.

Q. 22. What particular work did he do while he was with you? A. We sent him to Pittsburg to learn the full campaign there before bringing him into the office.

Q. 23. Was the Pittsburgh Post at that time running one of the newspaper campaigns? A. Yes. 6858

Q. 24. And how long did he stay in Pittsburgh studying the system there? A. Five or six weeks.

Q. 25. Then, what did he do? A. Then we brought him into the office to start him out on getting business for us.

MR. HALE: Complainant's Counsel cannot see the relevancy of this, but does not wish needlessly to object if anything relevant is to be offered. 6859

MR. CARROLL: Defendant's Counsel expects that the relevancy will appear in a minute.

Q. 26. Did he go out on the road as expected by you to make further connections with newspapers? A. No sir.

Q. 27. What did he do? A. He stayed in the office less than a week and told me he had decided to quit. 6860

Q. 28. Did he quit? A. Yes.

Q. 29. When did you next see Mr. Murphy? A. Within two or three weeks I met him in Detroit, in a hotel.

Q. 30. For whom did he say he was working then? A. He said he was working for the Merriams.

6861

Albert L. Swift—Direct.

Q. 31. What was he doing for them? A. Endeavoring to get newspaper contracts on the dictionary plan with a condensed dictionary published by Merriam.

Q. 32. Did he succeed in introducing the condensed dictionary in Detroit? A. No.

6862

MR. HALE: This entire line of examination is objected to as incompetent, irrelevant and immaterial.

Q. 33. Did he introduce the condensed dictionary of the Merriams in any of the cities of this country? A. Yes.

Q. 34. What ones, if you remember? A. The first one I noticed, I believe, was in Albany, the Times Union.

6863

Q. 35. Any others? A. The Ohio State Journal, Columbus. I also recall the St. Louis Republic. I don't remember any more. He was out on an Omaha paper, but I have forgotten what it was,—quite a number.

Q. 36. Were the newspaper campaigns carried on by these newspapers in connection with the condensed dictionary originated by you referred to, by the Pittsburg Post?

6864

MR. HALE: I object to that as incompetent, irrelevant and immaterial and calling for a mere conclusion of the witness, and as not the best evidence. The advertisements issued in the course of the campaign inquired about being the best evidence of how it was carried on.

A. Yes.

Q. 37. Did the newspapers which carried on the campaigns in connection with the Merriam Web-

Albert L. Swift—Direct.

6865

ster's Condensed Dictionary copy the advertisements which had been originally used by the Pittsburgh Post?

MR. HALE: Objected to as incompetent, irrelevant and immaterial and as not the best evidence, and wholly secondary. Any similarity between the advertising matters inquired about can only be shown by the production of such advertisements. It is further objected to upon the ground that the Merriam Company has been in no way connected with such advertising matter, but as a matter of fact has nothing whatever to do with it. 6866

A. Yes.

Q. 38. And they also copied the general scheme—that is to say, books given in return for a nominal amount of money and coupons clipped on consecutive days from the newspaper. 6867

MR. HALE: The same objection; and by consent this objection is to apply to the entire line of examination in regard to the sale of Webster's condensed dictionary through the newspapers.

A. Yes.

Q. 39. Did the newspapers carrying on the campaign in connection with the Merriam Webster's Condensed Dictionary also copy the system of the front page reading notices? A. Yes. 6868

Q. 40. And the text of such notices?

MR. HALE: I object to it upon the grounds already reserved, and upon the further ground that it assumes the Merriams copied the system of advertising by

6869

Albert L. Swift—Direct.

means of reading notices, which is an old established practice, not originated by the Syndicate Publishing Company, but used by the Merriams long before the Syndicate Publishing Company published any dictionary.

A. Yes; and the text of such notices.

6870

Q. 41. Did you come in close contact personally with any of the newspaper campaigns carried on in connection with the Merriam Webster? A. Yes, sir.

Q. 42. Did any newspaper carry on a campaign in connection with the dictionary of the Syndicate Publishing Company in the same city in which the Merriam Webster was being featured? A. You mean competing campaign of the two books; newspapers with the two books—one with the Merriam book and one with ours?

6871

Q. 43. Yes, A. Yes.

Q. 44. Were these campaigns hotly contested? A. Yes.

Q. 45. Which was the most hotly contested of all?

MR. HALE: I object to that as incompetent, irrelevant and immaterial, and as calling for a mere conclusion.

6872

A. The campaign in St. Louis was the Merriam book and the St. Louis Republic, and the book published by us distributed by the St. Louis Post Dispatch was a representative competitive campaign.

Q. 46. Were the other campaigns which were referred to as competitive, as hotly contested as the St. Louis one?

Albert L. Swift—Direct.

6873

MR. HALE: Same objection.

A. They were along the same lines, but the paper handling the Merriam book was not as vigorous in their fight as it was in St. Louis.

Q. 47. Do you mean that papers handling the Merriam book in other cities were not as vigorous in their campaign as the St. Louis Republic? A. That is what I mean. As a rule they generally stopped handling and advertising the book when we began making the competitive comparison. St. Louis did not stop for three or four weeks.

6874

Q. 48. I show you a clipping cut from the St. Louis Republic of September 11th, 1911, and ask you if that is copied from the reading notice which appears on the clipping attached thereto cut from the Pittsburgh Post of March 4th, 1911?

MR. HALE: Objected to as incompetent, irrelevant and immaterial, and as calling for matter not within the knowledge of the witness, and as calling for a conclusion. The advertisements are the best evidence of their contents and as to the source of their contents this witness has shown no knowledge.

6875

A. I clipped each article from each of these papers. The article in the St. Louis Republic is a repetition of the articles printed in the Pittsburgh Dispatch in March, the St. Louis Republic reprinting them as a reference to the Merriam Condensed Dictionary the following September.

6876

Q. 49. Do you know who wrote the reading notice that appears in the Pittsburgh Post? A. Yes.

Q. 50. Who? A. Mr. Paterson. At the time the article was written he was in the employ of

6877

Albert L. Swift—Direct.

the Pittsburgh Post and afterwards came with us.

Q. 51. Was this article copyrighted? A. Oh, no.

Q. 52. You make no claim, therefore, that any copyright was infringed? A. No; we merely secured from the Pittsburg Post permission to use it with our other papers.

6878

Q. 53. I show you a page cut from the St. Louis Republic of September 3rd, and ask you if that is one of the advertisements in the campaign which you have referred to as having been carried on in connection with the Merriam Webster's Dictionary? A. It is. I clipped it from that paper.

6879

Q. 54. Do you find the following words in that paper in large type, "To the happy possessor of a genuine Webster's Dictionary, illustrated 20th Century Edition, comes the assurance of having a work that has received the highest praise from leading educators, from the United States Supreme Court, the Supreme Court of Missouri, and of all other States, many State Superintendents of schools, and recognized leaders in the legal and medical professions in St. Louis"? A. Yes.

Q. 55. Have you a copy of Webster's Condensed Dictionary, 20th Century Edition, which is referred to in this advertisement? A. Yes.

6880

Q. 56. Can you produce it now? A. I have it at my office.

Q. 57. Will you produce such book? A. Yes.

MR. CARROLL: I offer that in evidence, the advertisement in the St. Louis Republic of September 3rd.

Q. 58. There are certain marks which appear on that advertisement. Can you explain that marking? A. Yes.

Q. 59. Did you make the marks yourself? A. Yes.

Q. 60. What do they mean? A. That the parts marked were previously printed in the Pittsburg Post advertising, for the dictionary printed by the Syndicate Publishing Company which was being distributed by the Post.

Q. 61. The following language is marked as that referred to, and no other language marked: "All you need to do is to cut out seven dictionary coupons of consecutive dates from the daily and Sunday Republic and present same with the specified bonus which covers cost of packing, express from factory, checking, clerk hire and other necessary expense items. All the new words." A. This is a different sentence, a display line. 6882

Q. 62. Display line, "All the new words, splendidly illustrated." Large display line "make yourself a present." I show you another advertisement of the St. Louis Republic dated September 4th and ask you if that— A. (No answer.) 6883

Q. 63. Does that contain the following language in large type: "This splendid up-to-date lexicon of the English language, published by G. & C. Merriam & Company, is a practical abridgement of the well known unabridged, which with its successor the New International is the accepted authority on the English language endorsed" and so forth? A. Yes. 6884

Q. 64. And does it also contain the statement, "Bound like a bible in genuine full seal grain Morocco"? A. Yes.

Q. 65. Is there any part of that advertisement which you can state of your own knowledge is copied from one of the advertisements originated by the Pittsburg Post? A. Yes.

6885

Albert L. Swift—Direct.

Q. 66. What? A. The large display line in the advertisement, namely, "Bound like a bible", is taken from the display line of the Pittsburg Post. I know that I wrote that line for the Pittsburg Post. They printed it, and six months later I find it in that.

MR. CARROLL: I offer that in evidence.

6886

Q. 67. I show you an advertisement from the St. Louis Republic of September 5th, 1911, and ask you if you cut that from said paper? A. Yes.

Q. 68. Does the heading there being in extraordinarily large display type, "Genuine 20th Century Webster's Dictionary"? A. Yes, sir.

Q. 69. Is there material copied in this advertisement? A. Yes.

6887

Q. 70. Will you indicate it? A. The box display alongside of the cut, same as the previous quotation, beginning, "All you need to do is to cut out seven dictionary coupons" and so forth; the initial statement, as to the United States Census, "In this dictionary are the census papers of 1910, which are of great importance just now, showing the wonderful growth of various cities during the last decade, and of vital importance to all who would keep abreast of the remarkable progress of our country."

6888

Q. 71. Is that taken word for word from the Pittsburg Post? A. Yes; I wrote it.

Q. 72. Does it also appear in this advertisement, "No other dictionary publishes as complete census figures as this"? A. Yes.

Q. 73. Is that statement true?

MR. HALE: I object to that as irrelevant and immaterial.

Albert L. Swift—Direct.

6889

A. No, sir; our dictionary had nearly double.

Q. 74. Is this display line at the bottom cut from the Pittsburg Post, "Start clipping coupons to-day."

MR. HALE: I object to the form of the question as improper, the question should be directed to pointing out identity or similarity, without stating conclusions in connection therewith.

6890

A. Yes.

MR. CARROLL: I offer this in evidence.

Q. 75. I show you another advertisement headed "St. Louis Republic, September 6th," and ask you if you can identify that as having been cut by you from that newspaper? A. Yes.

MR. CARROLL: I offer this in evidence.

Q. 76. Does this advertisement contain the following language: "Webster's 20th Century Dictionary published by the G. & C. Merriam Company, the same concern which publishes the New International Dictionary, which is endorsed by the United States Supreme Court, the Supreme Court of Missouri," and so forth? A. Yes.

6891

Q. 77. And further, "The 20th Century is a condensed form of the larger book made available for more convenient and easy reference?" A. That is what it states.

6892

Q. 78. Does it also state, "Such an opportunity has never before been offered in St. Louis to procure the latest edition of Webster's Dictionary, the recognized standard?" A. Yes, sir.

Q. 79. I show you another advertisement headed, "St. Louis Republic, September 8th, 1911,"

6893

Albert L. Swift—Direct.

and ask you if you can identify that as having been cut from said paper? A. Yes, I cut it from that paper, and it contains an advertisement of the Merriam Dictionary.

Q. 80. In large letters on the cut of the dictionary is the following statement, "This is a genuine Webster"; also the name G. & C. Merriam Company? A. Yes.

6894

Q. 81. Also the circle wreath and monogram trademark of the G. & C. Merriam Company? A. Yes.

Q. 82. Also quotations from members of the Supreme Court, Superintendents of schools, doctors and so forth? A. Yes.

Q. 83. Referring to Webster's International Dictionary? A. Yes.

6895

Q. 84. Is there also a statement in large display type "The Republic offers you an opportunity to get a genuine 1911 edition of Webster's 20th Century Dictionary?" A. Yes; it also has the usual notice of the details of the plan in the exact wording of that used in the Pittsburg Post previously.

Q. 85. I show you an advertisement cut from the St. Louis Republic of September 9th and ask you if you can identify that as one cut from said paper by you? A. Yes.

6896

Q. 86. Does this contain the statement "It is not altogether easy, however, to foresee how many dictionaries will be required. Boston quickly took 35000. Pittsburgh grabbed up 40000." Does it contain that statement? A. Yes. That is not the whole quotation, although it appears as you have read it.

Q. 87. What is the whole quotation? A. "Have you got your seven coupons? If you have,

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6897

hustle them down to the Republic Dictionary Department, south end of the counting room, ground floor, and get your Webster's 20th Century. The Republic hopes to be able to supply these dictionaries to all who want them. It is not altogether easy, however, to foresee, just how many will be required. Boston quickly took 35000. Pittsburg grabbed up 40000.' That is the complete quotation.

6898

Q. 88. Is the statement that Pittsburg grabbed up 40000 of the Webster's dictionaries a correct one? A. No.

Q. 89. Do you mean that the "Condensed Dictionary" was never sold in Pittsburg? A. Not on this plan or in that quantity.

Q. 90. Did you telegraph from St. Louis at that time—namely, September 9th, 1911—to the Pittsburg Post and ask whether they knew of any such distribution as that set forth in this advertisement?

6899

MR. HALE: I object to that as incompetent, irrelevant and immaterial, as a transaction between this witness, an employee of the defendant, and third persons, and in no way binding upon the complainant, and as pure hearsay.

A. Yes.

Q. 91. Did you receive a telegram which I now show you, in reply? 6900

MR. HALE: Objected to upon the same grounds, and protest is made against the abuse of this method of examination.

A. Yes.

6901

Albert L. Swift—Direct.

MR. CARROLL: I offer the telegram in evidence.

MR. HALE: The same objection repeated. Counsel would not dream of pursuing this course if there were a Court present to rule upon the propriety of such evidence.

(Subject to this objection the telegram is set forth in full as follows:)

6902

"The Western Union Telegraph Company."

Number Sent by Rec'd By Check

10 C X 29 Collect 12:34 P.M.
9/9 1911.

Received at St. Louis, Mo. H. O. Southern Hotel.

Telephones: Main, 3440. Kinloch-Central, 270

Dated W. Pittsburg, Pa. 9.

To A. L. SWIFT
So. Hotel

6903

Sold forty thousand six hundred Syndicate Publishing Dictionaries used no other was greatest publicity game ever in Pittsburg and we got credit as an Educator of the people. The Pittsburg Post."

MR. CARROLL: I offer the advertisement of September 9th St. Louis Republic, in evidence.

6904

Q. 92. I show you an advertisement marked "St. Louis Republic, September 10th," and ask you if you can identify that? A. I cut it from that paper on that date.

Q. 93. Does this advertisement also refer to Webster's Condensed Dictionary? A. Yes.

Q. 94. Does it contain the statement in large display type, "Endorsed by Missouri Educators"? A. Yes.

Albert L. Swift—Direct.

6905

Q. 95. Does it contain a list of new words? A. Yes, as follows, large display paragraph, reading, "Look in the dictionary you are now using and see how many you can find of these new words, which have been incorporated into our language only recently: Hangar, helicopter, hydroaeroplane and so forth," and the list ending with the words, "hookworm, lettergram, thermostat."

Q. 96. Are all those words in the Webster's Condensed Dictionary?

6906

MR. HALE: Objected to, and in addition to the grounds already reserved, as secondary, and because the book will speak for itself, and the book is not here present to be used upon the cross examination of this witness.

A. I made a careful examination and found that they were not contained in the Merriam Webster's Dictionary. I also made an examination and found that that entire column with the paragraph under it was wrong, as descriptive.

6907

Q. 97. Identify the paragraph under it somehow? A. Beginning, "Rufus Choate"—was wrong as descriptive of the Syndicate Publishing Company book of the Pittsburg Post campaign the previous spring.

MR. CARROLL: I offer that in evidence.

MR. HALE: It is understood, I presume, that all this is subject to the reserved objection.

6908

MR. CARROLL: Yes.

Q. 98. I show you a whole page advertisement headed St. Louis Republic, September 17th, 1911, and ask you if you cut that from that paper? A. Yes.

6909

Albert L. Swift—Direct.

Q. 99. Does this advertisement contain on the cover of the dictionary cut the Merriam trademark, circle wreath and monogram? A. Yes sir.

Q. 100. Does it contain the following language, "The Republic gives you the opportunity of a lifetime to secure at trifling cost the best small dictionary in the world. You may never have another chance like this to own a genuine G. & C. Merriam Company's Webster's"? A. Yes.

6910

Q. 101. Also in large display type, "Webster's 20th Century Dictionary"? A. Yes.

Q. 102. I show you a coupon cut from the St. Louis Republic dated September 19th, 1911, and ask you if you cut that coupon from said paper? A. Yes.

6911

Q. 103. And I ask you if it contains the word "Genuine G. & C. Merriam Webster's Condensed Dictionary Coupon"? A. Yes; that is their regular coupon that they ran in that campaign.

Q. 104. I show you a large display advertisement headed "St. Louis Republic September 19th, 1911," and ask you if you cut that from the newspaper mentioned? A. Yes.

Q. 105. Does this advertisement begin with the large display statement, "The truth about what is called 'Webster's New Standard Dictionary, Illustrated' "? A. Yes.

6912

Q. 106. Does it also contain the following language, "There is a book being sold by another St. Louis Newspaper known as 'Webster's New Standard Dictionary, Illustrated.' This work has absolutely no connection with the genuine Webster family. It was imported into the United States from England some years ago, about 1904, by a Dr. Klopsch, an editor of a New York Weekly. It was then and there known as the

Albert L. Swift—Direct.

6913

Crown Dictionary. Dr. Klopsch, after using it as a premium on his paper sold the right to revise and reprint it in this country to several publishing concerns. It never knew the name of Webster until 1908. Then the publishers of the book now offering in St. Louis, realized that the public had come to know Webster's as a mark of the highest merit in dictionaries (having been used for sixty-seven years by the G. & C. Merriam Company) adopted that family name for the market value it would give their books.

6914

"But note that this dictionary does not bear the circle trademark of the G. & C. Merriam Company. That would invite prosecution. The Merriam Company now have a suit pending in Court by which they aim to restrain other publishers from using the name Webster's, holding it as a part of their trademark. If the suit is decided in their favor, the old English Dictionary, masquerading as Webster's, will be given a new name. A copy of the Crown Dictionary above mentioned can be found at the dictionary department of the Republic and compared with Webster's New Standard Dictionary, Illustrated, by anyone desiring to substantiate these statements. This aforesaid alien orphan, the plates for which long ago became worn and obsolete, having no expense for editing and no editor, not even having its pages numbered, can be purchased very cheaply and sold to newspapers that are willing to foist it on an unsuspecting public as a Webster's Dictionary, at a profit to themselves.

6915

6916

"Sold in St. Louis for 98c. Newspaper advertisements are on file in the Republic Office showing that as late as June 11th this same book was offered by a certain New York paper for 89c. The

6917

Albert L. Swift—Direct.

extra charge of nine cents is the odd way adopted by its present newspaper sponsor to show "its appreciation of the loyalty of its readers."

6918

"Webster's Condensed Dictionary, 20th Century Edition, the G. & C. Merriam Publication, has never been offered by any newspaper at less than eighty-nine cents, and cannot be purchased at any store, the entire edition being reserved for newspaper distribution.

"The Republic welcomes legitimate competition. It claims no monopoly in its great educational offer of dictionaries, although first in the field. It only desires that those who want to accept this offer shall know the facts, and that those who desire to secure genuine Webster's dictionaries shall not be misled by clever misrepresentations into accepting a cheap imitation." A. Yes.

6919

Q. 107. Is the statement that Webster's Condensed Dictionary cannot be purchased at any store, the entire edition being reserved for newspaper distribution, correct?

MR. HALE: Objected to as not correctly quoting the language of the advertisement, which refers specifically to Webster's Condensed Dictionary, 20th Century Edition, and not to any copy of any edition of that book.

6920 A. No, sir.

Q. 108. I show you two advertisements headed the St. Louis Star, September 11, 1911, and one, the St. Louis Times, September 7, 1911, both advertising the store of William Barr & Company, and ask you if that contains an advertisement of Webster's Condensed Dictionary for eighty-five cents, being sold by the William Barr store?

Albert L. Swift—Direct.

6921

MR. HALE: I object to that as irrelevant and immaterial, because the advertisement produced is not an advertisement of the 20th Century Edition of Webster Condensed Dictionary.

A. Yes.

Q. 109. Did you go to the store of William Barr? A. Yes, and investigated the advertisement.

6922

Q. 110. Did you purchase one of these books? A. Yes.

Q. 111. For eighty-five cents? A. Yes.

Q. 112. Does the advertisement of September 19th, in the St. Louis Republic, above referred to, also contain this language, "Genuine Webster's Dictionaries, bearing the Merriam circle trademark, are endorsed by the United States Supreme Court, the Supreme Court of Missouri, the diplomatic service, and leading educators throughout the country"? A. Yes.

6923

Q. 113. Does it also contain a display type, "You don't want a copy of an imitation when you can get the genuine at less cost"? A. Yes.

MR. CARROLL: I offer these three advertisements in evidence.

Q. 114. I show you an advertisement headed St. Louis Republic, September 20th, and ask you if that was cut from that paper by you? A. Yes.

6924

Q. 115. Does it contain the following language in large display type, "This is your guide" with a copy of the circle wreath and monogram trademark of the G. & C. Merriam Company? A. Yes.

Q. 116. Also, "You don't want a copy of an imitation when you can get the genuine at less cost"? A. Yes.

6925

Albert L. Swift—Direct.

Q. 117. Also, "A circle is the trademark of the G. & C. Merriam Company. It is a guarantee of the highest merit in dictionaries. It means that a concern that has manufactured dictionaries for sixty-seven years past puts its reputation behind any book which bears that trademark? A. Yes.

6926

Q. 118. Also; "There are many so-called Webster's Dictionaries, but the kind that is used in ninety-nine per cent. of the leading schools, colleges and universities of the country, the kind that is endorsed by the United States Supreme Court, the kind the Republic is offering, is the genuine Webster's Dictionary, made by the old reliable Merriam Company, successors of the master mind of dictionary building, Noah Webster, is the kind that bear the circle trademark on the front cover. Why take an imitation when you can get the genuine for less"? A. Yes.

6927

MR. CARROLL: I offer this in evidence.

MR. HALE: We will consider each one offered as you refer to it.

Q. 119. I show you an advertisement headed St. Louis Republic, September 22nd, 1911, and ask you if that was cut from that paper by you? A. Yes.

6928

Q. 120. Does this contain in large display type at the head, "Genuine Webster's Dictionary, 20th Century Edition"? A. Yes.

Q. 121. Does it also include a coupon headed "Genuine G. & C. Merriam Webster's Condensed Dictionary coupon"? A. Yes.

Q. 122. At the bottom, the statement, "All genuine Webster's dictionaries bear the circle trademark on the front cover. Look for the circle"? A. Yes.

Albert L. Swift—Direct.

6929

Q. 123. I show you an advertisement headed St. Louis Republic, September 24th, 1911, and ask you if that contains the following language "Genuine Webster's dictionaries bear the circle trademark on their front cover. That is your guide. Look for the circle. It has no taint on its lineage. It belongs to the genuine Webster family." A. Yes.

Q. 124. Also in large display type, "Protect the children. Would you put into the hands of an innocent child a book which has absolutely no standing, a mere makeshift of a dictionary, recognized in no schools or colleges, containing no derivations, and not even having an editor? Then be cautious. Such a book is being offered in St. Louis to-day, loudly proclaimed as a four dollar book when it could be sold easily for ninety-eight cents with profit to its vendors," and at the bottom in large display type, "be sure and get the genuine Webster's the 20th Century?" A. Yes.

6930

6931

Q. 125. Also, "Bound in seal grain Morocco?" A. Yes.

Q. 126. Did you examine one of the books advertised as being bound in seal grain Morocco? A. Yes.

Q. 127. Was it bound in seal grain Morocco? A. No, sir.

Q. 128. What was it bound in? A. Skiver.

Q. 129. What would a seal grain Morocco binding for a book of this size cost per volume? A. It is very expensive.

6932

Q. 130. I show you an advertisement cut from the St. Louis Republic of October 1st, 1911, and ask you if you yourself cut that from said newspaper? A. Yes.

Q. 131. Does it contain the following language,

Albert L. Swift—Direct.

6933

"To-day the 1911 or 20th Century edition of Webster's Dictionary is offered to the people in St. Louis and the State of Missouri by the Republic by special arrangement with G. & C. Merriam Company at Springfield, Mass., the legitimate and direct successors of Noah Webster. This edition is the very latest on the market."

6934

MR. HALE: Objected to, in addition to other grounds reserved, as incompetent, irrelevant and immaterial, because not connected with the Merriam Company, and as no evidence whatever of the facts recited therein.

A. Yes.

6935

Q.132. Does it also contain the following language, marked "A," "There is not a man, woman or child in St. Louis, from bank president to boot black, from working girl to society matron, big or little, young or old, who cannot find something of vital value in this dictionary?" A. Yes, sir.

Q. 133. Did you ever see language of that kind in any other advertisement? A. Yes.

6936

Q. 134. Where? A. I wrote it, and it was printed in the Pittsburgh Post in the previous Spring in connection with the dictionary sold by us to that paper.

Q. 135. Also the language, "Don't miss this golden opportunity. It comes to you once in a lifetime." A. Same answer as to the previous question.

Q. 136. When did you first notice the campaign in the St. Louis Republic in connection with the Merriam Webster's Dictionary? A. Just about September 1st, the first week in September.

Albert L. Swift—Direct.

6937

Q. 137. What particularly attracted your attention to it? A. The advertisement appearing in the St. Louis Republic, the first day that it advertised the Merriam book.

Q. 138. Was there anything particular about that advertisement which attracted your attention? A. Yes, I saw they were advertising it exactly along the same lines used by the Pittsburgh Post in their campaign with the book that we had sold them.

6938

Q. 139. Did you go to St. Louis yourself? A. Yes.

Q. 140. Did you go to the editor of the St. Louis Republic and call his attention to that fact?

A. Yes—the publisher, rather than the editor.

Q. 141. Who was that? A. Mr. Knapp.

Q. 142. Did he in the end admit that his advertisements were taken from those which appeared in the Pittsburgh Post?

6939

MR. HALE: I object to it as incompetent, irrelevant and immaterial, and as leading; also as relating to a transaction with a third person, not in any way binding upon the complainant, and as hearsay.

A. I showed him the ads previously used by the Pittsburgh Post. He explained to me that he thought his copy for the ad. had been given to him for the Merriam book campaign—been clipped from newspapers that had used the Merriam book.

6940

Q. 143. Did you convince him that that was not the fact?

MR. HALE: Same objection.

A. Yes, I showed him, for instance, that one was a list of words—had him send down and get a

6941

Albert L. Swift—Direct.

book from his own counter and check back those words, and showed him in the advertisement in the Pittsburgh Post six months before, with the exact same words in that he was carrying, and asked him if that did not convince him that that portion of that ad. had been clipped from the paper handling our book instead of the Merriam book. He said it did.

6942

Q. 144. At or about this time did any other St. Louis paper begin a campaign with the books of the Syndicate Publishing Company entitled "Webster's New Standard Dictionary"? A. Yes.

Q. 145. What paper was that? A. The St. Louis Post Dispatch.

6943

Q. 146. Was that the occasion for the comparisons and statements concerning the Syndicate Publishing Company book which appeared in the advertisements of the St. Louis Republic in connection with the Merriam book? A. Yes.

Q. 147. Did those featured advertisements in the St. Louis Republic injure the sales of the dictionary which was being sold by the St. Louis Post Dispatch?

MR. HALE: Objected to as irrelevant, and immaterial and leading and as calling for a conclusion.

6944

A. No, sir. Our sale in St. Louis through the Post Dispatch was very large.

Q. 148. Have you a record of the sales which were made by the St. Louis Post Dispatch in competition with the Merriam Condensed Dictionary? A. Yes.

Q. 149. What were those sales? A. I have a record here showing the sales by weeks and also

Albert L. Swift—Direct.

6945

before coming down I looked on our book and saw the total sales we had in St. Louis. The total sales we had in St. Louis exceeded thirty thousand.

Q. 150. What were the sales by weeks? A. On September 15th and 16th, which were the first two days of the distribution, they sold 2,236 copies. The week ending September 23rd they sold 6,799 copies.

6946

Q. 151. Was it in that week that the advertisement in the St. Louis Republic particularly denouncing the book published by the Syndicate Publishing Company appeared?

MR. HALE: Objected to as irrelevant and immaterial.

A. Yes.

Q. 152. Will you continue giving the sales? A. Week ending September 30th they sold 2,918. The week ending October 10th they sold 991. The week ending October 17th, 861; the week ending October 24th, 676; the week ending October 31st, 1,056. The week ending November 7th, 2,037. The week ending November 14th, 5,278.

6947

Q. 153. Did that end the campaign. A. No.

MR. HALE: Go on to the end of the campaign.

A. That is all the figures I have.

6948

Q. 154. Did the campaign last more than a day or two longer? A. The first campaign practically closed on November 14th, but the hangover sold several hundred or possibly considerably more than that the next week or two. Then, later—at a later time—for instance, during December, I think it was—we had to have a renewal cam-

6949

Albert L. Swift—Direct.

paign there, because the demand still kept up. I have not brought the figures for those; but the total of the two campaigns—that is, the two distributions—exceeded the thirty thousand.

Q. 155. I notice that these figures are large in the beginning and after the first week or two become smaller. Was that unusual? A. No; all campaigns bear that distinctive feature, wherever we have sold these dictionaries through papers.

6950

Q. 156. How do you account for that?

MR. HALE: I object to that as calling for the conclusion and surmise of the witness.

6951

A. The distribution of the first few days has been preceded by large preliminary advertising by the paper, announcing that their distribution will take place, which leads to an accumulation of coupons ready to be turned in. Then, after two or three weeks, I noted from the records turned in by the different papers, showing how many books they have distributed, that there is a sort of lull in the campaign. It comes down considerably. Then this is again brought up to relatively large quantities by the larger display advertising that the paper runs as they approach the completion of their campaign.

6952

Q. 157. Do you know when the campaign of the St. Louis Republic in connection with the Merriam Condensed Dictionary ended? A. I recall it was two or three weeks previous to ours.

Q. 158. Did it continue after the last advertisement, dated October 1st, 1911? A. I have looked up and was in touch with when the St. Louis Republic closed, but I have not the date or the memorandum here. It was previous to our closing. Our final close was after Christmas.

Albert L. Swift—Direct.

6953

Q. 159. Was the campaign of the St. Louis Republic in connection with the Merriam Webster's condensed Dictionary continued until November 14th, approximately? A. No, sir.

Q. 160. When did it end approximately? A. I can state with reasonable definiteness on that. The St. Louis Post Dispatch first closing was November 14th. They had ten preliminary closing days, that is, ten days preliminary to their closing. The day before that first one was printed the St. Louis Republic announced their closing offer that coming Saturday. Therefore, I can be positive in my statement that the Republic closed a week or ten days ahead of the Post Dispatch first closing, when the Post Dispatch were forced to open again by the demand upon them for the books.

6954

Q. 161. When did the Post Dispatch close for the second time? A. After Christmas.

Q. 162. I show you four certified copies of certificates of copyright issued to Frank E. Wright, dated respectively June 29, 1908, November 10, 1910, March 31, 1911, October 20, 1911, and ask you if those are copyrights relating to the New Illustrated Dictionary, and to Webster's New Standard Dictionary, published by the Syndicate Publishing Company?

6955

MR. HALE: Objected to upon the ground that the certificates speak for themselves.

6956

A. Yes.

MR. CARROLL: I offer these in evidence.

(By consent the certificates are set forth at length in the record, and are as follows):

6957

*Albert L. Swift—Direct.*COPYRIGHT OFFICE OF THE
UNITED STATES OF AMERICA.

A.

Library of Congress,
Washington, D. C.

CERTIFICATE OF COPYRIGHT REGISTRATION.

6958

THIS IS TO CERTIFY, in conformity with Section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, that two copies of the book named herein have been deposited in this office under the provisions of the said Act, together with the AFFIDAVIT prescribed in Section 16 thereof; and that an entry for copyright for the first term of 28 years from the date of publication of said book has been duly registered in the name of Frank E. Wright, New York, N. Y., book entitled Webster's New Illustrated Dictionary of the English Language.

Name and address of claimant.

6959

Chas. Leonard Stuart, Editor.

New York Syndicate Publishing Co., 1911.

Date of publication Nov. 8, 1910. Affidavit received Nov. 10, 1910. Copies received Nov. 10, 1910. Entry: Class A, XXc, No. 275310.

(SEAL)

ERNEST BRUNCKEN,
Assistant Register of Copyrights.

6960

COPYRIGHT OFFICE OF THE
UNITED STATES OF AMERICA.

A.

Library of Congress,
Washington, D. C.

CERTIFICATE OF COPYRIGHT REGISTRATION.

THIS IS TO CERTIFY, in conformity with Section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, that two copies of the book named herein have

Albert L. Swift—Direct.

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been deposited in this office under the provisions of the said Act, together with the AFFIDAVIT prescribed in Section 16 thereof; and that an entry for copyright for the first term of 28 years from the date of publication of said book has been duly registered in the name of Frank E. Wright, New York, N. Y.

Book entitled Webster's New Standard Dictionary, Illustrated.

6962

1910 Census, and maps.

Name and address of claimant.

Charles Leonard Stuart.

Date of publication Mar. 29, 1911. Affidavit received Mar. 31, 1911. Copies received Mar. 31, 1911. Entry: Class A, XXc, No. 283845.

(SEAL) ERNEST BRUNCKEN,
Assistant Register of Copyrights.

COPYRIGHT OFFICE OF THE
UNITED STATES OF AMERICA.

A.

6963

Library of Congress,
Washington, D. C.

CERTIFICATE OF COPYRIGHT REGISTRATION.

THIS IS TO CERTIFY, in conformity with Section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, that two copies of the book under the provisions of the said Act, together with the AFFIDAVIT prescribed in Section 16 thereof; and that an entry for copyright for the first term of 28 years from the date of publication of said book has been duly registered in the name of Frank E. Wright, New York, N. Y.

6964

Book entitled Webster's New Standard Dictionary, Illustrated, with U. S. Census and maps.

6965

Albert L. Swift—Direct.

New edition revised and edited under the direction of Edward T. Roe and Charles Leonard-Stuart, Edward T. Roe & Charles Leonard Stuart, revisers and editors, New York Syndicate Publishing Company, 1911.

Date of publication Oct. 18, 1911. Affidavit received Oct. 20, 1911. Copies received Oct. 20, 1911. Entry: Class A, XXc, No. 300206.

6966

(SEAL) ERNEST BRUNCKEN,
Assistant Register of Copyrights.

Class A, XXc, No. 210840.

LIBRARY of CONGRESS, to wit:

6967

BE it REMEMBERED,

That on the twenty-ninth day of June, 1908, Frank E. Wright, of Philadelphia, Pa., hath deposited in this Office the title of a book, the title of which is in the following words, to wit: Webster's New Illustrated Dictionary of the English Language, based upon the Unabridged Dictionary of Noah Webster, LL.D. Revised and brought up to date (etc).

Philadelphia: Syndicate Publishing Company, 1908, the right whereof he claims as proprietor in conformity with the laws of the United States respecting Copyrights.

6968

Office of the Register of Copyrights, Washington, D. C.

HERBERT PUTNAM,
Librarian of Congress.

By

THORVALD SOLBERG,
Register of Copyrights.

Albert L. Swift—Direct.

6969

I hereby certify that the foregoing is a true copy of the original record of copyright. IN WITNESS WHEREOF, the seal of this office has been hereto affixed this fifteenth day of May, 1912.

ERNEST BRUNCKEN,
Assistant Register of Copyrights.

(Seal)

Copyright Office of the United States of America,
Washington, D. C.

6970

Q. 163. Can you state approximately when the notice, "This dictionary is not published by the original publishers of Webster's Dictionaries or by their successors" was inserted by the Newark Star in its advertisements of the Webster's New Standard Dictionary? A. October 16th, 1911.

Q. 164. Have you a copy of the Newark Star of October 16th, 1911? A. Yes.

Q. 165. Will you produce it? A. Yes. 6971
(Produces).

MR. CARROLL: I offer the sixth page in evidence.

Q. 166. Did all advertisements of the Newark Star, so far as you know, in connection with Webster's New Standard Dictionary, after that date, contain the notice, "This dictionary is not published by the original publishers of Webster's Dictionary or by their successors? A. So far as I know they did, and I know that all were so ordered by us. 6972

Q. 167. Have you any more later advertisements? A. I have one of October 25th which contains the notice (produces).

MR. CARROLL: I offer that in evidence.

6973

Albert L. Swift—Direct.

Q. Do each of these advertisements which you have just identified contain the coupon in close proximity to this notice? A. Yes.

Q. 169. Have you a record of the sales of the dictionary by the Newark Star for a week or two before October 16th, and a week or two after that date? A. Yes.

6974

Q. 170. What does that record show? A. The record shows that the week ending September 30th, the Newark Star sold 476 copies; week ending October 7th, 398; week ending October 4th, 292; then the cautionary notice was inserted; the week ending October 21st, the distribution was 226; October 28th, the distribution was 183; November 4th, 266, November 11th, 556.

6975

Q. 171. Do you know on or about what date the notice, "This dictionary is not published by the original publishers of Webster's Dictionaries or by their successors" was inserted in the Buffalo Evening News? A. Yes.

Q. 172. About what date was that? A. October 16th, 1911.

Q. 173. Have you a copy of that paper with you? A. Yes, one of October 16th and one of October 19th, in both of which it shows the cautionary notice was running.

6976

MR. CARROLL: The one of October 16th is offered in evidence, and reference is hereby made to the advertisement of October 19th previously offered.

Q. 174. Does each one of these advertisements contain the notice, "This dictionary is not published by the original publishers of Webster's Dictionary or by their successors?" A. Yes.

Albert L. Swift—Direct.

6977

Q. 175. And in each one of them the coupon is in close proximity to that notice? A. Yes.

Q. 176. Have you a record of the sales for the week or two preceding October 19th and a week or two after October 19th, by the Buffalo Evening News? A. I have taken a record two weeks on each side of the printing of the cautionary notice as follows: October 7th, 619; October 14th, 517; October 21st, 860; October 28th, 3,235.

6978

Q. 177. Did all advertisements after October 16th contain the notice, "This dictionary is not published by the original publishers of Webster's Dictionary or by their successors?" A. To the best of my knowledge, and all were so ordered.

Q. 178. Do you know when the notice, "This dictionary is not published by the original publishers of Webster's Dictionary or their successors" was inserted in the Baltimore American? A. Yes, October 19th.

6979

Q. 179. Have you a copy of the Baltimore American of that date? A. Yes.

Q. 180. Will you produce it? A. Yes (produces).

MR. CARROLL: I offer it in evidence.

Q. 181. Does that contain the cautionary notice? A. Yes.

Q. 182. Is the cautionary notice a part of the same advertisement as the coupon? A. Yes.

6980

Q. 183. Have you a record of the sales at or about the 19th of October, 1911, by the Baltimore American? A. Taking two weeks on each side, week ending October 11th, 960; week ending October 18th, 714; week ending October 25th, 692; November 1st, 1,068; November 8th, 3,438.

Q. 184. Do you know on or about what date

6981

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the so-called cautionary notice was inserted in the Flint, Michigan, Journal? A. Yes.

Q. 185. What date was that; on or about what date? A. October 21st, 1911.

Q. 186. And have you a copy of the Flint Michigan Journal of October 21st, 1911? A. Yes

Q. 187. Will you produce it? A. Yes (produces).

6982

MR. CARROLL: I offer it in evidence.

Q. 188. Does this advertisement contain the notice, "This dictionary is not published by the original publishers of Webster's dictionary or by their successors?" A. Yes.

Q. 189. Is that notice printed directly under the coupon? A. Yes.

Q. 190. In this paper? A. Yes.

6983

Q. 191. Have you a record of the sales at or about that date? A. Yes. Do you want the ones previous?

Q. 192. Yes? A. October 7th, 335; October 14th, 110; October 21st, 131; October 28th, 98; November 5th, 202; November 11th, 453; November 18th, 561.

Q. 193. Did all of the advertisements published by the Flint Journal after October 19th contain the cautionary notice?

6984

MR. HALE: Objected to as not the best evidence and as not shown to be within the knowledge of the witness.

A. To the best of my knowledge they did, and all were so ordered.

MR. HALE: The answer is objected to as no evidence of the fact inquired about and motion is made to strike it out.

Albert L. Swift—Direct.

6985

Q. 194. Do you know on or about what date the so-called cautionary notice was inserted in the Taunton Daily Gazette? A. Yes, October 28th.

Q. 195. Have you a copy of the Taunton Daily Gazette of that date? A. Yes (produces).

MR. CARROLL: I offer that in evidence.

Q. 196. Does that contain the cautionary notice? A. Yes.

6986

Q. 197. Did the papers immediately after that and from then on until the end of the Taunton Campaign contain the cautionary notice? A. Yes.

Q. 198. Have you a record of the sales of the Taunton Daily Gazette? A. Yes.

Q. 199. In connection with the advertisement of the Standard Dictionary? A. October 14th, 67; October 21st, 52; October 28th, 69; November 4th, 50; November 11th, 43; November 18th, 39; November 25th, 50; December 2nd, 79.

6987

Q. 200. Do you know on or about what date the said cautionary notice was inserted in the Grand Rapids Press? A. Yes; October 17th.

Q. 201. Have you a copy of the Grand Rapids Press of October 17th? A. Yes.

Q. 202. Will you produce it? A. Yes (produces).

MR. CARROLL: I offer it in evidence.

Q. 203. Does that advertisement contain the cautionary notice? A. Yes.

6988

Q. 204. And as part of the same advertisement, does the so-called coupon appear? A. Yes, sir.

Q. 205. Do all the advertisements after this date inserted by the Grand Rapids Press in connection with this dictionary contain that notice?

6989

Albert L. Swift—Direct.

MR. HALE.—Objected to as incompetent, irrelevant and immaterial and not calling for any fact shown to be within the knowledge of the witness, but for a mere guess.

A. I made a careful search through all the Grand Rapids papers, and found it was in every one of them that I was able to find; and it was so ordered.

6990

Q. 206. In the other papers that you have testified about to-day, have you made a search through them after the dates given? A. I could not find one after those dates in any paper.

Q. 207. Which did not contain the notice? A. Which did not contain the notice.

Q. 208. Did the newspapers in each case send you complete files of their papers which contained the advertisement they were running? A. Yes, at the time.

6991

Q. 209. So that you would probably have in your possession and have probably seen practically all of the advertisements which have appeared in the newspapers specified, after the dates mentioned in which the cautionary notice was first inserted?

MR. HALE.—Objected to as argumentative and leading and calling for mere probabilities instead of for facts.

6992

A. Yes.

Q. 210. Have you a record of the sales made by the Grand Rapids Press on or about October 17th, 1911? A. Yes.

Q. 211. What does that record show? A. Part of the record; from October 2nd, 567; week ending October 9th, 523; October 16th, 335; October 23rd,

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6993

206; October 30th, 255; November 6th, 280; November 13th, 972.

Q. 212. Are these examples which I have shown you typical examples of the sales of newspapers at or about the time when the newspapers inserted the so-called cautionary notice?

MR. HALE: Objected to as calling for a mere conclusion and as not the best evidence.

6994

A. Yes.

Q. 213. Have you already given all the more important newspaper records of campaigns which were being carried on at or about the 15th of October, 1911? A. Yes.

Q. 214. It has been testified to by you and by Mr. Wright that on or about October 12th or 15th, 1911, a notice was sent to all of the newspapers which were then advertising the dictionary of the Syndicate Publishing Company requesting them to insert in their advertisements, "this dictionary is not published by the original publishers of Webster's Dictionary or by their successors". Did you watch with great care the effect upon the sales of the insertion in the advertising in the newspapers of that notice?

6995

MR. HALE: Objected to as incompetent, irrelevant and immaterial and calling for a conclusion and guess of the witness, as he cannot possibly know all the factors influencing purchasers; and the notice is only one of them.

6996

A. Yes.

Q. 215. Are you able to state from that observation what effect, if any, the so-called cau-

6997

Albert L. Swift—Direct.

tionary notice had upon the sales of newspapers?

MR. HALE: Same objection.

A. It had no effect.

Q. 216. Well, are you able to state? A. I am able to state, yes.

6998

Q. 217. What effect, if any, did this notice have? A. It had no effect. The sales by the papers ran right along just the same way. For instance, the figures I gave you in the testimony a few minutes ago at Baltimore—that is an extremely large ad (indicating) in the Baltimore American. We published the cautionary notice in the Baltimore American as the very largest display item of the advertisement, on October 31st. As I testified a while ago the sales for the week ending October 25th had been 692. Then, for the week ending November 1st, following this big display announcement and the cautionary notice, the sales were 1068, and the following week, November 8th, the sales were 3438.

6999

Q. 218. Did you send this notice which is exemplified by the exhibit taken from the Baltimore American of October 31st, to all of the newspapers who were selling your books? A. You mean the prominence of the display of the cautionary notice?

7000

Q. 219. I mean a notice of that size? A. With that same prominence of display, that notice was sent to every paper that was buying books of us.

Q. 220. I just want to call your attention at this point to the following exhibits which are already in evidence, and which are referred to in connection with the testimony of Mr. Swift, concerning the insertion of the cautionary notice in the last series of papers mentioned and in connection

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7001

with the sales in those newspapers. The Newark Star of October 20th, the Buffalo Evening News of October 21st, Grand Rapids Press of November 6th, Baltimore American of October 22nd, and October 31st, Flint Michigan Journal, November 6th.

MR. HALE: Objection is made to this pointing out of specific papers on the ground that such papers are not at all typical examples of the advertisements of defendant's dictionary which have appeared in the papers throughout the country, and particular advertisements which might be themselves unobjectionable are no evidence whatever that innumerable other objectionable advertisements have not been published.

7002

MR. CARROLL: Defendant's counsel remarks that the burden of proving the existence of any objectionable advertisements is upon the complainant, and there is no presumption that they exist.

7003

MR. HALE: The complainant has produced two volumes of such objectionable advertisements which have been offered in evidence.

CROSS EXAMINATION by Mr. Hale:

x Q. 221. Referring to the style of display of the cautionary notice in the Baltimore American of October 31st, 1911, did defendant give any special instructions after that—I mean as to the display. A. Yes, sir.

7004

x Q. 222. Just what was done in that respect? A. This type (indicating) was set up here at a job

7005

Albert L. Swift—Cross.

office in that style of type, and pasted on top of an advertisement and sent to the paper for copy.

x Q. 223. Was that the ordinary way of doing it? A. This was a special case. We wanted to send the cautionary notice in very large display to every paper on our list.

7006

x Q. 224. At that time? A. Yes, and at following times. Here is where it is run in the same type at a previous date in the Buffalo News (indicating), ten days earlier.

x Q. 225. And for how long did that use of display type for the warning notice continue? A. In that form, you mean, Mr. Hale?

x Q. 226. Yes; in that form of display? A. One or two ads to each paper.

x Q. 227. And how many papers carried it in that form? A. Whatever papers we had running at that time. I would not be able to say.

7007

x Q. 228. There were other papers at later dates which never carried the advertisement in that display form? A. Every campaign since then has always had those—

x Q. 229. In type as large as that, contained in the Baltimore American? A. Yes; just in one or two ads.

7008

x Q. 230. In the later ads the notices appeared in smaller type and in a different location? A. Oh, yes. The paper would not devote that much space to that announcement.

x Q. 231. Is there any paper since you first began using any form of cautionary notice that has not at least once carried the notice in their advertisements in as large a form of display type as the one contained in the Baltimore American of October 31st, 1911? A. I don't know of any.

x Q. 232. It is true, is it not, that the coupons

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7009

referred to in the advertisement are not always printed as a part of such advertisement? A. Yes.

x Q. 233. Frequently they appear upon another page of the paper? A. Yes.

x Q. 234. Have you pointed out any instances of a cautionary notice in connection with a coupon where the coupon was not a part of a distinctive advertisement of the book? A. The Newark Star of October 16th, 1911, and the Flint Journal of October 21st, 1911.

7010

x Q. 235. All the other coupons as to which you were specifically asked by your counsel were cases where the coupons appeared combined with the general advertisement of the dictionary? A. Yes, sir.

x Q. 236. In those two instances of the Newark Star and the Flint Journal, wasn't the coupon the only advertisement of the dictionary that appeared in those issues? A. Yes, sir; there is not a display advertisement in every issue of each paper.

7011

x Q. 237. Which campaign in St. Louis was the most successful in point of number of books distributed by the Post Dispatch, the first or the second one? A. The first campaign extended over quite considerably more period of time. The second campaign was just a short campaign of eight or ten days. More books were distributed on the long campaign.

7012

x Q. 238. You have not produced and offered in evidence any of the advertisements published by the St. Louis Post Dispatch, have you, in connection with this campaign? A. I would not know without referring to that list.

x Q. 239. Please refer to the advertisements which have been offered in evidence, and say

7013

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whether or not any from the St. Louis Post Dispatch have been thus offered in evidence? A. No; I have one in my hand that I am willing to offer in evidence.

7014

x Q. 240. In the Omaha Daily News of November 13th, 1911, which was subsequent to the beginning of this suit, I call your attention to the dictionary coupon and advertisement appearing on page 8 of that issue, and ask you if it is not true that that coupon and advertisement does not contain a cautionary notice in any form? A. The coupon on page 8 of the Omaha Daily News of November 13th does not have a cautionary notice, although the cautionary notice is on the reverse side of that page, in the display advertising of that date.

7015

x Q. 241. You mean that on page 7 of that newspaper there is a display advertisement which contains the usual cautionary notice? A. Yes.

x Q. 242. On page 8, in connection with the coupon, whether or not it forms part of it, is there not a description of the three styles of books with prices and the like? A. Yes; it has the appearance of the regular coupon being run by that paper, all enclosed in a border.

7016

x Q. 243. Is that matter thus enclosed on page 8 of that issue what you term the regular dictionary coupon? A. Yes, what I have termed the regular dictionary coupon of the Omaha Daily News—meaning that they are not all of standard size or wording.

x Q. 244. That is substantially the form in general use by different papers in the newspaper campaign at or about that date? A. I would think so.

x Q. 245. Did not the defendant furnish a cut or impression of that form of coupon for the use in the paper? A. Yes, when the contract was made; the contract for that paper being several months prior to November 13th.

x Q. 246. Was it an ordinary and usual part of the dictionary coupon used in the newspaper campaign to describe defendant's dictionary in its various styles as "the four dollar Webster's New Standard Dictionary, Illustrated, bound in full limp leather, flexible, stamped in gold on back, and others printed on bible paper, with red edges and corners rounded; beautiful, strong, durable. Besides the general contents as described elsewhere, there are maps, and over six hundred subjects, beautifully illustrated," and so forth, etc.? A. Yes.

7018

x Q. 247. And it was likewise a part of the ordinary and usual dictionary coupon to describe in like manner the \$3.00 edition and the \$2.00 edition? A. Yes.

7019

x Q. 248. As well as to give what is termed an expense bonus of ninety-eight cents, eighty-one cents and forty-eight cents for the three different styles? A. Yes.

x Q. 249. And you do not regard that as in any sense an advertisement? A. It has always been regarded by us as a coupon of the newspaper.

x Q. 250. It would also be fairly described as an advertisement, would it not? A. Well, I would not think so, any more than a reading notice.

7020

x Q. 251. What is a reading notice? A. A reading notice, as we understand the term, is any notice published on a page containing almost wholly reading matter instead of on an advertising page.

7021

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x Q. 252. That is quite a common element of newspaper advertising campaigns, is it not? A. In all newspaper promotion campaigns whether advertising or otherwise, the paper generally refers to their plans in the reading notices.

7022

x Q. 253. In the advertisement appearing in the Parsons Daily Sun of November 7th, 1911, which contains the cautionary notice, I find this language at the foot of the advertisement, "Caution—when a dictionary is offered you which is in any way similar to this one, observe the exact wording shown herewith. You want the latest. Don't be deceived. This is the latest." Whose language is that? A. That is the language of the paper. I cannot even tell what it means.

x Q. 254. That is not the language of any person connected with the Syndicate Publishing Company? A. No sir.

7023

x Q. 255. You think then that was inserted by this newspaper upon its own responsibility? A. Yes.

7024

x Q. 256. This same advertisement contains the following language, "Our publisher submits positive proof that the Sun's dictionary is the *latest*,—up to the day—filled to the full, 1,200 pages, with needful information—illustrated in color and monotone, and is complete, accurate and authentic from cover to cover." Whose language is that? A. The entire ad is a newspaper ad made up in their own way. It is not one of our standard ads at all.

x Q. 257. Was any part of that made from copy or plates furnished by the defendant? A. The table of contents, cautionary notice, the details regarding the books opposite the price, and the

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7025

cut of the book, evidently have been clipped from other advertising matter prepared by us.

x Q. 258. Did the defendant pay in cash for the publication of this ad? A. No sir.

x Q. 259. Did the defendant make any allowance in any way on credit to the paper on account of this ad? A. None whatever; entirely their own scheme.

x Q. 260. Was any provision as to advertisement made in the contract with this paper for the distribution of defendant's dictionaries? A. That they were to advertise the distribution.

7026

x Q. 261. Did the contract stipulate anything as to the expense or manner of advertising?

MR. CARROLL: I object to all this line of examination as having been already gone into at great length.

A. No; other than that they were to advertise the proposition.

7027

x Q. 262. Did not specify how much advertising should be given? A. No; it was their own proposition.

x Q. 263. In the last statement quoted from this, namely, that the publisher submits positive proof, and so forth—is that statement true? A. I cannot even imagine what it refers to.

x Q. 264. I presume you don't know then what the name authentic means in the statement quoted? A. It is not our language at all.

7028

x Q. 265. In the Lincoln Daily Star of November 7th, 1911, I notice a dictionary coupon in all respects like the one called to your attention which is contained on page 8 of the Omaha Daily News. You don't find any cautionary statement in that

7029

Albert L. Swift—Cross.

coupon or advertisement, whichever you care to term it, do you? A. No sir; it is in the display advertisement on the reverse side of that page.

x Q. 266. But on a totally different page? A. Yes.

7030

x Q. 267. In this advertising exhibit of Defendant's except where the dictionary coupon happens to appear upon the reverse side of the page, carrying the display advertisement, you have in no instance included the dictionary coupons, have you?

MR. CARROLL: I object to that question on the ground that the exhibit speaks for itself.

MR. HALE: I am simply following the example set by my learned opponent.

A. I have not seen any that do.

7031

x Q. 268. In the Easton Daily Argus of October 27th, 1911, the dictionary coupon appears upon a page by itself, the display advertisement being upon the reverse page. That also is the usual form of dictionary coupons without any cautionary statement, is it not? A. It is the usual form of dictionary coupon in use at that time.

7032

x Q. 269. And it contains no cautionary statement? A. It contains no cautionary statement; the cautionary statement was sent to that paper and each of these papers, with instructions to put that on each ad. They put them on one ad in the paper.

x Q. 270. I call your attention to the dictionary coupon which is an integral part of the display advertisement in the Evening Wisconsin of November 13th, 1911, and ask you if that is not in fact the ordinary form of dictionary coupon—the

descriptive matter which I quoted before being an advertisement and not part of the coupon? A. No, sir. That advertisement has been cut down on the part of the paper in economizing space. Our regular ad with that heading is a fixed column full depth.

x Q. 271. In other words, when the coupon is made an integral part of the advertisement the usual descriptive matter which I quoted from the first coupon as contained in the Omaha Daily News is omitted; is that correct? A. Yes; that matter is generally at the same time printed on another page with the coupon.

7034

x Q. 272. The Flint Daily Journal of November 6th, 1911, and the Baltimore American of October 31st, 1911, is another illustration of the coupon as used when combined with the usual display advertisement? A. In those particular ads the coupon proper is undoubtedly on some other page of those issues.

7035

x Q. 273. In addition to the coupon which is contained in the advertisement? A. Yes.

x Q. 274. Does it ever occur or is it at all usual for two coupons to be published in the same issue of a single paper? A. It has occurred; yes, sir.

x Q. 275. How often? A. Well, I know of instances where the paper has doubled up the coupon in the ad where they have let it run in its accustomed place elsewhere.

7036

x Q. 276. And in such instances the coupon which is not a part of the double ad is in the full form as quoted from the Omaha Daily News? A. Yes.

x Q. 277. What is the full name of the Mr. Murphy you referred to? A. J. F.

x Q. 278. Do you know his present address? A.

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7037

I saw him about five weeks ago, and he told me where he was.

x Q. 279. Where was he then? A. He told me he was traveling for the Merriam Company.

x Q. 280. Did he say the Merriam Company or Reilly & Britton? A. He said the Merriam Company.

7038

x Q. 281. Did he tell you what book he was selling at that time? A. Webster's Condensed.

x Q. 282. Where did you see him? A. I saw him on the train coming from Chicago to Philadelphia. He told me he lived at Worcester.

x Q. 283. Have you ever heard of Reilly & Britton in connection with Webster's Condensed Dictionary, 20th Century edition, in connection with a newspaper campaign? A. I did not.

7039

x Q. 284. Have you heard of them in connection with any edition of Webster's Condensed Dictionary offered through a newspaper campaign and in competition with the Syndicate Company's book? A. Never have heard of them in connection with anything offered in the line of a dictionary in competition with the Syndicate book. I remember selling papers or books for canvassing purposes—nothing within the last two years that I know of.

7040

x Q. 285. Don't you know that their name appears in the publisher's imprint upon the Webster's Condensed Dictionary to which you have referred in your direct testimony as having been offered through newspapers? A. I didn't notice it, if it does.

x Q. 286. The advertisement of Webster's Condensed Dictionary by William Barr of St. Louis did not describe the book as the 20th Century Edition, did it? A. The cut of the book they used in

the advertisement was Webster's Condensed. The only difference between that book on sale at Barr's and the Merriam book on sale at the St. Louis Republic consisted in the stamping of the words "20th Century Edition" on the cover of the St. Louis Republic Book; the addition of the four page tip printed on a different color paper headed, "A Glossary of Aviation terms"; and the insertion of a few half tone pictures. The text matter and all prefatory matter was identical in each case.

7042

MR. HALE: The answer is objected to as not responsive and motion is made to strike it out.

x Q. 287. Did you compare each and every page of the books? A. No, sir.

x Q. 288. You did not compare each and every word, of course? A. No sir; just representative pages throughout the book,—same folios in each book.

7043

x Q. 289. What was the latest copyright appearing in the book which you purchased from William Barr? A. I don't know.

x Q. 290. You don't know the date of that edition? A. I don't know.

x Q. 291. Beyond the fact that the Webster's Condensed Dictionary used by the St. Louis Republic is a book belonging to the Merriam Company, you don't know of your own knowledge, what, if any, connection the Merriam Company had with the newspaper campaign upon that book to which you have referred? A. Yes, I do.

7044

x Q. 292. What do you know of your own knowledge? A. The advertisement in the St. Louis

Albert L. Swift—Cross.

7045

Republic states—it has been offered in evidence—makes that statement.

x Q. 293. Is that all you know about the connection of the Merriam Company with it? A. And that it is a Merriam book.

x Q. 294. That comprises your entire knowledge upon that subject, does it not? A. No sir.

7046

x Q. 295. What else do you know? A. In the St. Louis Republic of October 1st, the statement is made, "The Republic by special arrangement with the G. & C. Merriam Company of Springfield, Mass., offer", etc.

x Q. 296. That is the statement to which you referred before? A. Yes. Now, in addition to that, in my conversation with Mr. Knapp, the publisher of the St. Louis Republic, during the entire conversation he always spoke of it as their contract with the Merriam people.

7047

MR. HALE: I object to the witness's statement of what Mr. Knapp told him as incompetent, irrelevant and immaterial, and not responsive, and motion is made to strike it out.

7048

x Q. 297. Do you regard what you have been told or what you merely read in the newspapers as facts within your own knowledge? A. When substantiated by such facts as I have recited here.

x Q. 298. Have you now stated your full knowledge upon that subject? A. Mr. Murphy told me that he sold the Merriam book—

MR. HALE: I object to what Mr. Murphy told you.

THE WITNESS: I think that is responsive to your question.

Albert L. Swift—Cross.

7049

MR. HALE: I asked for knowledge, not for what you were told.

THE WITNESS: I will put in the answer and you can have it stricken out.

MR. HALE: I object to that as obviously taking advantage of the method of taking proofs in equity before an Examiner.

THE WITNESS: Mr. Murphy told me that he had sold the Merriam book to the St. Louis Republic and was there handling the campaign, and in the St. Louis Republic office, when I called on Mr. Knapp— 7050

MR. HALE: The statement of what Mr. Murphy said is objected to as irrelevant, incompetent and immaterial, and as not responsive, and motion is made to strike it out.

x Q. 299. Was there any special advertising matter prepared for what you have termed hotly contested campaigns conducted between rival newspapers in the same city? A. Yes; there was at St. Louis. 7051

x Q. 300. Did you prepare any of it? A. I assisted in it.

x Q. 301. Who else assisted in it? A. The editor of the St. Louis Post Dispatch.

x Q. 302. And you were on the ground at the time? A. Yes; helping him. 7052

x Q. 303. Was it customary in closing campaigns to require only one coupon from purchasers? A. No; until it got down inside of too few days for them to clip a full series. The closing campaign started twelve or fifteen days from the end of the campaign, and then coupons were required until there were too few days to clip

7053

Albert L. Swift—Cross.

those coupons; then the paper generally changed it to one coupon.

x Q. 304. Was it at all customary at any stage of the campaign for newspapers to supply dictionaries without coupons as in the case of the New York American, for example? A. I don't know of any such example.

7054

x Q. 305. An advertisement of the New York American has been offered in evidence, headed "Never mind the coupon" and there has been other evidence offered that the New York American supplied dictionaries without requiring the coupons. Was that at all customary? A. No, sir, that must have been a "slopover ad." That must have been after the close of the campaign, Mr. Hale,—left over books that had been purchased.

7055

x Q. 306. I presume the advertisement will speak for itself. A. I presume so. I don't just recall it.

7056

x Q. 307. You have spoken of certain letters which have been offered in evidence from purchasers of defendant's dictionaries through the newspapers, and said that some of them you received yourself. How did that happen? A. At St. Louis, the editor there had me in his office, at a little desk there and letters of that kind he would just hand over to me to prepare the amendatory advertising.

x Q. 308. How long were you there under those circumstances? A. I think I was there a month.

x Q. 309. Did that same thing ever occur at any other newspaper office? A. Oh, yes. It was a universal practice.

x Q. 310. Do you mean to say that you went around to other newspaper offices and received

Albert L. Swift—Cross.

7057

mail referring to these dictionaries? A. I don't mean to say that; but, as a matter of fact, I did call at a large majority of these places and it was quite usual for them to show me letters of that character.

x Q. 311. What is the greatest length of time you ever spent in any other newspaper office in connection with this campaign? A. I spent a month in Detroit.

x Q. 312. Where else? A. Probably ten days in Pittsburgh.

7058

x Q. 313. And shorter periods at other places? A. Shorter periods—I don't recall extensive periods at any other place—a day or two; different prominent places.

x Q. 314. This was after the campaign had started? A. Yes, sir, and before.

x Q. 315. And while they were in progress? A. Yes.

x Q. 316. Who paid you your salary for that period of time? A. The Syndicate Publishing Company.

7059

x Q. 317. And you were engaged on their business? A. Yes, in assisting the newspaper in securing circulation.

x Q. 318. Was any matter sent out or prepared by the Syndicate Publishing Company with a view of eliciting testimonial letters? A. Yes.

x Q. 319. And suggestions were made as to features to be noted in the matter thus sent out? A. In books sent out, quite often the paper composed a little slip asking for the recipient of the book to make any comments thereon that the facts warranted.

7060

x Q. 320. And that slip contained suggestions? A. It contained different headings and features of the book.

7061

Albert L. Swift—Cross.

x Q. 321. In the advertisement in the Springfield Union of October 21st, I notice a detailed comparison of the Syndicate Publishing Company's book and the Webster's Condensed Dictionary. Was that a special advertisement for the Springfield Union, or was that an advertisement universally employed in your campaigns? A. It was not universally employed.

7062

x Q. 322. Was that or a similar advertisement employed only in cases of what you have termed "hotly contested campaigns" in cities where rival books were handled by rival papers? A. No, it was not used in those cities. There was no contest in Springfield, and—for instance, I recall that it was not used in St. Louis.

x Q. 323. What other places, if any, was it used, besides Springfield? A. I don't know.

x Q. 324. You don't recall any? A. No.

7063

x Q. 325. I will refresh your recollection. Was not a similar advertisement comparing the two books used in Peoria, Illinois? A. Yes.

x Q. 326. That was an instance of what you term a "hotly contested campaign" between the rival books? A. No, we didn't have much of a contest there from the other books.

x Q. 327. There was a contest there? A. They were running at the same time we were, but they soon quit.

7064

x Q. 328. Before making arrangements with newspapers to undertake the distribution of these books, did you explain to them that the book had previously been published under the name of the Crown dictionary? A. No, sir.

x Q. 329. Did you explain to them what, if any, connection there was between it and any Webster's Dictionary? A. No, sir, they always

sent for a sample and that statement occurred on the title page.

x Q. 330. You mean, based upon the unabridged dictionary of Noah Webster and so forth? A. Yes.?

x Q. 331. And beyond that you made no explanation? A. No, sir.

x Q. 332. And none were ever asked for? A. None at all. I told every paper that we published the book. All papers thoroughly understood that.

7066

x Q. 333. They naturally understood who they were dealing with? A. Yes.

x Q. 334. Did any of them question your right to publish the book? A. No, sir.

x Q. 335. I presume they all assumed it to be a genuine Webster's Dictionary; is that correct? A. I cannot assume. They were all delighted, I know.

7067

x Q. 336. You have stated a number of papers where you say this man, Murphy, introduced the Merriam Company's book. Do you mean anything more than that the Webster's Condensed Dictionary, published by the Merriams, was used by those newspapers? A. Murphy gave me the information himself, and spoke of it.

x Q. 337. So your testimony is based wholly upon what Mr. Murphy told you, in that regard?

A. And the finding of the Merriam book on sale by the different papers.

7068

x Q. 338. Did you ever go to headquarters and complain to the Merriam Company itself that your advertisement had been copied by various newspapers in connection with the condensed dictionary? A. Yes.

7069

Albert L. Swift—Re-direct.

x Q. 339. When? A. On my visit to Springfield.

x Q. 340. In October, 1911? A. In October, yes.

x Q. 341. Never before? A. No, sir.

x Q. 342. What did they say to you in that connection then? A. Mr. Washburn or Mr. Baker said they knew nothing about it.

7070

x Q. 343. This is the visit to which you have testified when you were formerly on the stand and which was brought about by reason of the warning letter which the Merriam Company sent to the Syndicate Publishing Company? A. By reason of their failure to answer the letter, we sent in reply to that, so that we went up.

x Q. 344. It was, however, the only occasion on which you went to Springfield? A. The only occasion, yes.

7071

RE-DIRECT EXAMINATION by Mr. Carroll:

R-D. Q. 345. Did you ever see the advertisement referred to by Mr. Hale as having appeared in the New York American containing the statement: "Never mind the coupon"?

MR. HALE: The question is objected to as irrelevant and immaterial, as the advertisement will speak for itself, and that particular advertisement is in evidence.

7072

A. I don't recall it. If the advertisement is in evidence it is undoubtedly a little clean-up ad of the American; some books that they had left over and desired to get rid of after the campaign closed. It is not a usual procedure.

R-D. Q. 346. Was it ever a part of the procedure in these campaigns suggested by you to the newspapers? A. Never.

Albert L. Swift—Re-cross.

7073

R-D. Q. 347. What were you doing in the newspaper offices which you say you were in for from two or three days at a time to a longer period up to a month, during which period you have testified you were paid by the publishing company?

MR. HALE: Objected to as irrelevant and immaterial.

A. My work was in the circulation department of the paper, in assisting them to gain subscribers by this dictionary campaign, mapping out and showing them the routine done by the previous newspapers that have been successful. In fact, working right in their circulation department.

7074

RE-CROSS EXAMINATION by Mr. Hale:

R-x Q. 348. No one was required to subscribe to any of these newspapers for any period of time in order to obtain the dictionary? A. Not always; sometimes. Some papers offered it that way.

7075

R-x Q. 349. Will you point out any advertisement offered in evidence in which there was any requirement that people desiring dictionaries must subscribe to the paper? A. I don't know of that style here. I know of cases of that kind. I could give you papers that did it that way.

R-x Q. 350. At what date? A. The Cleveland Plain Dealer—during the summer of 1911.

7076

R-x Q. 351. How long did you have to subscribe for that paper to obtain a dictionary? A. They offered it both ways, on the coupon plan as the usual plan—for so many coupons and so much money, and if you subscribed for three months you paid less money, at the time you took the book.

7077

Albert L. Swift—Re-cross.

R-x Q. 352. On the coupon plan, sometimes six coupons were required and sometimes only three; is that not correct? A. Well, no; I think our campaign as laid before the papers always was six, sometimes seven.

R-x Q. 353. And you don't recall any where only three were required? A. No; I don't. If there are, they must be isolated cases.

7078

R-x Q. 354. As in the case of the New York American people desiring one of these dictionaries, where they were only required to purchase six Sunday papers in order to obtain six coupons, were they not? A. That is all.

7079

R-x Q. 355. And out of the amount termed expense bonus, ninety-eight cents, eighty-one cents or forty-eight cents, the newspaper had to be paid for its advertising space and other expenses connected with the distribution, and the Syndicate Company had to be paid for its book. It had all to come out of what the dictionary coupon calls the expense bonus; is that correct? A. No, sir.

7080

R-x Q. 356. In what respect is it not correct? A. Leaving out the feature of the increased circulation that the paper got, which much more than offset the expense of any nature that they were put to. For instance, the Pittsburgh Post had a circulation of twenty-five thousand. They put out forty-one thousand books on their sales to their subscribers and increased their circulation over twenty-five per cent by the plan.

R-x Q. 357. How many coupons did that paper require? A. Six.

R-x Q. 358. What does that paper sell for? A. It sells for one or two cents.

George W. Ogilvie—Direct.

7081

BY MR. CARROLL:

R-D. Q. 359. I show you a page cut from the St. Louis Post Dispatch of November 8th, 1911, and ask you if that is one of the advertisements of the Syndicate Publishing Company, sold by the St. Louis Post Dispatch? A. Yes.

MR. CARROLL: I offer that in evidence.

BY MR. HALE:

7082

Q. There were numerous other advertisements issued by the St. Louis Post Dispatch, both prior and subsequent to the time last mentioned, were there not? A. The same applies to all these papers that have been offered in evidence.

DEPOSITION CLOSED.

(Signature and oath of witness waived by consent.)

7083

Adjourned to June 27th, 1912, at 11 o'clock A. M.

NEW YORK, June 27th, 1912.

Met pursuant to adjournment.

Present: Counsel as before.

7084

GEORGE W. OGILVIE, a witness called by and on behalf of the defendants, having been first duly cautioned and sworn, testified as follows:

DIRECT EXAMINATION by Mr. Carroll:

Q. 1. What is your age? A. Fifty-two.

7085

George W. Ogilvie—Direct.

Q. 2. Residence? A. New York City.

Q. 3. And occupation? A. I was formerly a publisher. I am at present not engaged in business.

Q. 4. How many years were you in the publishing business? A. Twenty-five—twenty-eight or thirty. I have forgotten exactly—let me see—twenty-eight or thirty years.

7086

Q. 5. About what date did you go into the publishing business? A. 1882, I think it was, or 1884, I went in business for myself.

Q. 6. Have you during all or part of that time made a special study of dictionaries? A. Yes, and before that.

Q. 7. What has that study consisted of? A. Well, that is a pretty broad question. I don't know that I can understand it.

7087

Q. 8. How have you studied dictionaries? A. By referring to them and making a close examination of them and looking them over with the idea in mind of afterwards or sometime publishing a dictionary of the English language.

Q. 9. When did this study begin? A. About 1875 or 1876.

Q. 10. Did you ultimately publish a dictionary of the English language? A. I did.

Q. 11. When was that? A. The first in 1890; later, a revision of that work, in 1904.

7088

Q. 12. What was the name of the book you published in 1890? A. Webster's dictionary.

Q. 13. When did you begin the preparation of the book which you have just testified was a revision of that Webster's dictionary and was ultimately published in 1904? A. About 1891.

Q. 14. How long did that preparation continue? A. Thirteen years.

George W. Ogilvie—Direct.

7089

Q. 15. What did it consist of? A. In collecting material, revising it, doing editorial work on different parts of the dictionary which I considered myself competent to do. I may say incidentally I have done a great deal of compiling, some of my books, one in particular having had a sale of three million and one-half copies.

Q. 16. What was that? A. Conklin's Manual of Useful Information, and others of my compilations totalled sales of approximately ten million copies.

7090

Q. 17. Can you name these other compilations?

MR. HALE: Objected to as incompetent, irrelevant and immaterial.

A. Conklin's "Writing Desk Book"; Conklin's "World's Best Proverbs"—I should say fifteen books published under the name of "Conklin" of various titles.

7091

Q. 18. In the preparation of the revision of the Webster's dictionary which you first published in 1890, did you from time to time have assistants? A. Yes.

Q. 19. What was the number of those assistants? A. They ran from one to a hundred as the time progressed; approximately one hundred; might have been a few more or a few less.

Q. 20. Did you keep any accurate account of the expenses involved in the revision and editing of the book you have testified you published in 1904? A. Not in any of the twelve years preceding the last or thirteenth year; just simply spent the money—part of my daily expense.

7092

Q. 21. Did you in the last or thirteenth year keep an accurate account of these expenses? A. Approximately accurate.

7093

George W. Ogilvie—Direct.

Q. 22. What did that amount to in that year?

A. About \$70,000.

Q. 23. Can you give me some estimate of the expense prior to that time?

MR. HALE: Objected to as wholly irrelevant and immaterial.

7094

A. I would not attempt to do so accurately. It might have been as much more or more than as much more.

Q. 24. You think it probably was?

MR. HALE: Objected to as calling for a guess.

A. I do.

7095

Q. 25. What was the name of this dictionary when it was finally published. A. It was published under various titles; Webster's Imperial Dictionary was the title selected first.

Q. 26. Was it based upon the Webster's dictionary which you say you first published in 1890?

A. It was.

Q. 27. Was this a large or unabridged Webster's dictionary? A. The most complete one that had ever been published up to the date of its issue.

7096

MR. HALE: The answer is objected to as incompetent, irrelevant and immaterial and not responsive, and as a mere expression of opinion by the witness.

Q. 28. Did you advertise this book from time to time? A. Extensively.

Q. 29. Can you state how much you expended in this advertising?

George W. Ogilvie—Direct.

7097

MR. HALE: Objected to as irrelevant and immaterial.

A. Approximately one hundred thousand dollars.

Q. 30. If \$100,000 is not exactly correct, is the amount more or less? A. Maybe more or less; approximately. I remember at one time having paid \$1,500 to Everybody's Magazine for one issue. That is merely indicative of how the total might have exceeded \$100,000.

7098

Q. 31. During approximately what years was this expenditure of \$100,000 for advertising made? A. From 1903 to 1908. I began the advertising of the dictionary before it was published.

Q. 32. And this advertising was all under the name of "Webster's Imperial" or— A. Or "Webster's Universal."

Q. 33. Or "Webster's Universal" dictionary? A. Yes.

7099

Q. 34. What Webster's dictionaries have you known of?

MR. HALE: Objected to unless the books are produced and identified.

A. There is a standard book of reference published, called the "United States Catalogue," which assumed to give the current—or the list of books that have current circulation.

Q. 35. Have you examined that United States Catalogue? A. I have.

7100

Q. 36. And what Webster's dictionaries did you find in it?

MR. HALE: Objected to as incompetent, irrelevant and immaterial, and as calling for pure hearsay.

7101

George W. Ogilvie—Direct.

A. A total of fourteen not published by the G. & C. Merriam Company—

MR. HALE: May I see the paper to which the witness is referring, please?

MR. CARROLL: Surely. (Handing paper.)

7102

A. It gives a list of eleven Webster's dictionaries not published by G. & C. Merriam Company, which is only a partial list, however, as I know of many others.

Q. 37. What other Webster's dictionaries do you know of? A. I know of a total of sixty-seven Webster dictionaries, not published by G. & C. Merriam Company.

7103

Q. 38. Can you give that list? A. I cannot give the titles of all of the books. I can give the names of the publishers of the number of books that have been published under the name of "Webster," so far as my present knowledge goes. There may be more than sixty-seven, but I know of sixty-seven.

7104

MR. HALE: This line of examination is objected to as incompetent, irrelevant and immaterial, unless the books are produced, and especially unless the titles of the books are produced. I object to the witness describing, in an indefinite manner, books of various publishers, as simply Webster's dictionaries. The testimony as given in that manner is too general to be of any value or to be tested by cross examination.

Q. 39. Will you give the list of publishers as accurately as you can of the sixty-seven Webster's dictionaries? A. Many of the dictionaries published by G. & C. Merriam Company, many years

George W. Ogilvie—Direct.

7105

ago, have merely the title "Webster's Dictionary" on their back. That is true of some of the dictionaries that are included in this list. I will endeavor to give, as far as I can, the titles—the sub-titles of the dictionaries, or the distinguishing words that may be inserted between "Webster's" and "Dictionary," or preceding the word "Webster": Myles Vest Pocket Dictionary, published by E. E. Myles of South Lancaster, Massachusetts; M. A. Donahue of Chicago, published four Webster's dictionaries, the original Webster's reprint, Webster's Vest Pocket Dictionary, and two others, the titles of which I am slightly in doubt about.

7106

Q. 40. Have these two others the name "Webster" in their title? A. They have. All of these dictionaries have the name Webster in the title, that are distinguished by some other word—that is the sixty-seven to which I referred. W. B. Conkey Company, two Webster's dictionaries, one of which is Webster's Original Unabridged, and the other is Webster's Business and College Dictionary. L. W. Walters Company, one Webster's dictionary. David McKay, of Philadelphia, one Hill's Vest Pocket Webster. Laird & Lee, Chicago, nine Webster's dictionaries. Grimm's Webster's, Salva Webster's, Webster's New Standard Dictionary.

7107

Q. 41. Please give the publishers? A. I am. These are all Laird & Lee. Collegiate Edition. Webster's New Standard Dictionary, Common School Edition. Webster's New Standard Dictionary, High School edition. Laird & Lee's Vest Pocket Webster's dictionary—and some others, the distinguishing titles of which I do not recall.

7108

Q. 42. All of this last list is published by Laird

7109

George W. Ogilvie—Direct.

7110

7111

7112

& Lee? A. All published by Laird & Lee, comprising a total of not less than nine and possibly more—but of nine I am certain. The Werner Company of Akron, Ohio, one Webster's dictionary. Saalfeld Publishing Company, Akron, Ohio, eight Webster's dictionaries, the titles of which are Webster's Encyclopedic dictionary, Webster's Vest Pocket Dictionary, Webster's New Unabridged Dictionary, Webster's Imperial Dictionary, Webster's InterCollegiate Dictionary, Webster's Adequate Dictionary, Webster's Sterling Dictionary, Webster's Original Unabridged. Thompson & Thomas, Chicago, Webster's School and Office Dictionary, and Webster's Vest Pocket Dictionary. J. B. Lippincott Company of Philadelphia, three Webster's dictionaries; Harper & Brothers, two Webster's dictionaries. George W. Ogilvie, five Webster's dictionaries. George W. Ogilvie & Company, one Webster's dictionary. A. L. Burt, one. Hurst & Company, one. People's Publishing Company, one. Hampden Publishing Company, one. Reilly & Britton, who are agents for G. & C. Merriam Company, published one Webster's Dictionary, not issued by G. & C. Merriam Company. W. R. Van Sant, one. Cupples & Leon, one. John C. Winston Company, Philadelphia, one. I. & M. Ottenheimer, one Vest Pocket Webster. Lamont O'Donnell & Company, one. Mutual Publishing Company, one. W. B. Bechtold, one. Frank Brothers, one. R. S. Peale, one. Excelsior Publishing Company, one. J. Duffy's Sons, one. J. & D. West, one. Mason Brothers, one. Ivison, Blakeman, Taylor & Company, one. F. J. Huntington & Company, one. White & Sheffield, one. White, Gallagher & White, two. Loomis Brothers,

George W. Ogilvie—Direct.

7113

one. Henry G. Allen & Company, one. The Syndicate Publishing Company, two. Unknown publishers, two.

Q. 43. What were the titles of those books? A. I cannot guess that. I know there are two such books, however. Just a moment. I think I can help you on that (examining paper). No, simply a Webster's dictionary. I cannot give it to you—making a total of sixty-nine instead of sixty-seven as I said before—making a total of sixty-nine Webster's dictionaries not published by G. & C. Merriam Company, and forty publishers other than G. & C. Merriam Company have issued dictionaries bearing the name of "Webster" in their title.

7114

MR. HALE: I should like to see the papers to which the witness is referring and testifying from.

(The papers were handed to Mr. Hale.) 7115

Q. 44. Do you know the date of the first publication of the Hurst Webster's Dictionary to which you have referred? A. In the '70's. I think it was 1879; certainly in the 1870's.

Q. 45. Did this book have a large sale to your knowledge? A. I have seen it in hundreds of bookstores myself. It must have had a very large sale.

Q. 46. When was the first Webster's dictionary published? A. In 1806. 7116

Q. 47. Do you know the name of the publishers of that dictionary? A. I do not.

Q. 48. Was that dictionary copyrighted? A. It was.

Q. 49. When did the copyright expire? A. 1834; that is the copyright and its renewal. The

7117

George W. Ogilvie—Direct.

copyright at that time being fourteen years, with a renewal of fourteen years.

Q. 50. Have you in your possession cards obtained from the Library of Congress? A. I have.

Q. 51. Showing Webster's dictionaries in the Library of Congress not published by the G. & C. Merriam Company? A. I have.

7118 Q. 52. And bearing a date on their title pages prior to 1889? A. Yes; I have sixteen of such cards.

Q. 53. Will you produce those cards? A. (The witness produces cards.)

MR. CARROLL: I offer them in evidence. (By consent the cards are spread at length upon the record, and are as follows:)

WEBSTER, NOAH, 1758-1843.

7119 A pronouncing and defining dictionary of the English language, abridged from Webster's American Dictionary. By Chauncey A. Goodrich

To which are added, Walker's Key to the pronunciation of classical and Scripture proper names; A vocabulary of modern geographical names..(by J. Thomas). Philadelphia, J. B. Lippincott & Co., 1856: XXIII, (1), 610 p. 23 cm.

7120 1. English language—Dictionaries. I. Goodrich, Chauncey Allen, 1790-1860 ed. II. Thomas, Joseph, 1811-1891. III. Walker, John, 1732-1807.

10-29034†

Library of Congress. PEL826. W 4G 6. 1856.

WEBSTER, NOAH, 1758-1843.

An American dictionary of the English language; exhibiting the origin, orthography, pro-

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7121

nunciation, and definitions of words. By Noah Webster, LL. D. Abridged from the quarto ed. of the author. To which is added a synopsis of words differently pronounced by different orthoepists. Rev. and enl. by Chauncey A. Goodrich. Philadelphia, J. B. Lippincott & Co., 1867.

vii, (xi)-xxii, (2), 1319 p. 24 cm.

Two columns to the page.

I. Goodrich, Chauncey Allen, 1799-1860, ed.

7122

Library of Congress.

4-20107.

WEBSTER, NOAH, 1758-1843.

A primary school dictionary of the English language, explanatory, pronouncing, and synonymous. With an appendix containing various useful tables. Mainly abridged from the latest ed. of the American dictionary of Noah Webster, LL. D., by William G. Webster and William A. Wheeler—New York, Ivison, Phinney, Blakeman & Co.; Philadelphia, J. B. Lippincott & Co.; (etc., etc.) 1868.

7123

xii, 13-352 p. illus. 16 cm.

1. English language—Dictionaries. I. Webster, William Greenleaf, 1805-1869, ed. II. Wheeler, William Adolphus, 1833-1874, joint ed.

10-2904

Library of Congress.

PE1628.W4W3 1868

7124

WEBSTER, NOAH, 1758-1843.

Webster's handy dictionary. A handy dictionary of the English language. .from the latest edition of the large dictionary of Noah Webster, LL.

7125

George W. Ogilvie—Direct.

D., by Loomis J. Campbell. New York, Ivison, Blakeman, Taylor & Co., 1878.

320 p. illus. 13-1/2 cm.

1. English language—Dictionaries. I. Campbell, Loomis Joseph. 10-29028+

Library of Congress.

PE1628.W4C3

7126

WEBSTER, NOAH, 1758-1843.

An American dictionary of the English language. By Noah Webster, LL. D. Abridged from the quarto ed. of the author, to which are added a synopsis of words differently pronounced by different orthoepists; and Walker's Key to the classical pronunciation of Greek, Latin, and Scripture proper names. Rev. and enl. by Chauncey A. Goodrich. With the addition of a vocabulary of modern geographical names, with their pronunciation. New York, Harper & Brothers, 1853.

7127

xxii, (2), 1152, viii, (9)-113 p. 25 cm.

At head of title: This rev. ed. contains all the words in the quarto ed., and also an arrangement of synonyms under the leading words.

The Key has special t.-p. and paging.

7128

1. English language—Dictionaries. I. Walker, John, 1732-1807. II. Goodrich, Chauncey Allen, 1790-1860, ed. Library of Congress. PE1628.W4G6 1853.

WEBSTER, NOAH, 1758-1843.

A dictionary of the English language; abridged from the American dictionary, for the use of pri-

George W. Ogilvie—Direct.

7129

mary schools and the counting house. By Noah Webster, LL.D., 19th ed. New York, F. J. Huntington & Co., 1840.

2 p. l, vi, (7)-536. p. 14 x 13½ cm.

1. English language—Dictionaries.

10-29035†

Library of Congress. PE1628. W4H7 1840.

7130

WEBSTER, NOAH, 1758-1843.

A dictionary of the English language; abridged from the American dictionary, for the use of primary schools and the counting house. By Noah Webster, LL.D. 19th ed. New York, F. J. Huntington & Co., 1842.

2 p. l, vi, (7)-536 p. 15 x 13½ cm.

1. English language—Dictionaries.

10-29036†

Library of Congress. PE1628. W4H7 1842.

7131

WEBSTER, NOAH, 1758-1843.

An American dictionary of the English language; exhibiting the origin, orthography, pronunciation, and definitions of words. By Noah Webster, LL.D. Abridged from the quarto ed. of the author; to which are added, a synopsis of words differently pronounced by different orthoepists; and Walker's Key to the classical pronunciation of Greek, Latin, and Scripture proper names. Stereotype ed. New York, White & Sheffield, 1839.

xxiii (1), 1011 p. 25 cm.

The Key has special t.-p.

7132

1784

7¹³³

George W. Ogilvie—Direct.

1. English language—Dictionaries.

1. Walker, John, 1732-1807.

Library of Congress PE1628. W3 1839
11-155†

WEBSTER, NOAH, 1758-1843.

7¹³⁴

...An American dictionary of the English language... By Noah Webster, LL.D. Abridged from the quarto ed. of the author, to which are added a synopsis of words differently pronounced by different orthoepists; and Walker's Key to the classical pronunciation of Greek, Latin, and Scripture proper names. Rev. and enl., by Chauncey A. Goodrich... With the addition of a vocabulary of modern geographical names, with their pronunciation. New York, Harper & brothers, 1852.

7¹³⁵

xxii, (2), 1152, viii, (9)-113 p. 24½ cm.
(continued on next card).

11-154†

WEBSTER, NOAH, 1758-1843.

7¹³⁶

A dictionary of the English language; abridged from the American dictionary, for the use of primary schools and the counting house. By Noah Webster, LL.D. New York, White, Gallaher & White, 1831.

4. p. l., vi. (7)-532 p. 14 x 13½ cm.

1. English language—Dictionaries.

10-29052†

Library of Congress. PE1628. W4W9 1831.
.....Copy 2.

George W. Ogilvie—Direct.

7137

WEBSTER, NOAH, 1758-1843.

A dictionary of the English language; abridged from the American dictionary, for the use of primary schools and the counting house. By Noah Webster, LL.D. New York, White, Gallaher & White, 1830.

4 p. l., vi., (7)-532 p. 15 x 13½ cm.

1. English language—Dictionaries.

11-149†

7138

Library of Congress. PE1628. W4W9 1830.

WEBSTER, NOAH, 1758-1843.

An American dictionary of the English language; exhibiting the origin, orthography, pronunciation, and definitions of words. By Noah Webster, LL.D. Abridged from the quarto ed. of the author; to which are added, a synopsis of words differently pronounced by different orthoepists. And Walker's Key to the classical pronunciation of Greek, Latin, and Scripture proper names. (New York, c1857).

7139

xxiii, (1), 1011 p. 25 cm.

The Key has special t.p., dated 1838.

Title edition, originally published 1838.

1. English language—Dictionaries.

1. Walker, John, 1832-1807.

11-152†

7140

Library of Congress. PE1628. W3 1857.

7141

George W. Ogilvie—Direct.

WEBSTER, NOAH, 1758-1843.

...An Amercian dictionary of the English language... 1852. (Card 2).

At head of title: This rev. ed. contains all the words in the quarto ed., and also an arrangement of synonyms under the leading words.

The Key has special t.-p. and paging.

1. English language—Dictionaries.

7142

I. Walker, John, 1732-1807 II.

Goodrich, Chauncey Allen, 1790-1860, ed.

11-154†

Library of Congress. PE1628. W4G6 1852.

.....Copy 2.

Imprint date of Key, 1853.

WEBSTER, NOAH, 1758-1843.

7143

A dictionary of the English language; compiled for the use of common schools in the United States. By Noah Webster, esq. New Haven, Sidney's press, printed for J. and D. West, Boston; (etc., etc.) 1807.

v. (1) 306 p. 16½ cm.

1. English language—Dictionaries.

11-148†

Library of Congress. PE1628. W4W85.

WEBSTER, NOAH, 1758-1843.

7144

A critical pronouncing dictionary of the English language. New and improved ed... By Noah Webster, LL.D. Cor. and improved, by James W. Kavanagh... Dublin, J. Duffy, Sons & Co., 1872.

George W. Ogilvie—Direct.

7145

vi. 535 p. front (port. group) 19½ cm.

1. English language—Dictionaries.

1. Kavanagh, James W.

10-29029†

Library of Congress.

PE1628. W4k3.

WEBSTER, NOAH, 1758-1843.

7146

Common-school pronouncing dictionary of the English language. Abridged from the American dictionary of Noah Webster, LL.D., by William G. Webster . . . New York, Mason brothers (c1857). vii, (8)-320 p. 16 cm.

1. English language—Dictionaries.

1. Webster, William Greenleaf,

1805-1869, ed.

10-29047†

Library of Congress. PE1628. W4W35. 1857.

7147

Q. 54. Is it customary in the trade when a copyright expires of a book of references, if that book of reference had any copyright, for various editors and publishers to take the books of reference and revise them and bring them down to date?

MR. HALE: I object to that as incompetent, irrelevant and immaterial.

A. It is.

7148

Q. 55. Can you name some instances of that custom?

MR. HALE: Same objection.

A. Encyclopedia Britannica, Webster's dictionary, Chitty's Pleadings, which is published un-

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der exactly the same conditions as Webster's dictionary, issued by G. & C. Merriam, they having taken the uncopyrighted edition and re-edited it to date and published it under their own name as publishers, but retaining the name "Chitty's Pleadings." The Holy Bible also, which was published by G. & C. Merriam Company, without any authority, I think, from the editors.

7150 You need not take that down.

MR. HALE: Yes, I want everything the witness says taken on the record.

A. (Continuing). That was not testimony, and I may also say I have the honor of publishing—

Q. 56. Have you in the last thirty years had occasion to observe advertising by various publishers of Webster's dictionaries in connection with their books? A. Yes, I followed that very closely.

7151 Q. 57. Why have you followed it so closely? A. Having in mind the intention of publishing a Webster's dictionary at some time, and keeping informed of everything connected with not only Webster's but all other dictionaries that I could get any information in regard to.

Q. 58. What varieties of Webster's dictionaries? A. In reply to Webster's dictionary, everything in connection with which a dictionary could be sold, I think, has been exploited, as far down the line as typewriter ribbons, and as far up the line as suits of clothes and household furniture, and trade schools, colleges, individuals.

7152 Q. 59. Have you seen Webster's dictionaries advertised in the newspaper? A. Very exten-

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7153

sively. Whole pages have been devoted to it. Half pages innumerable. Quarter and eighth pages, so many that it would be impossible to name them.

Q. 60. Have you seen Webster's dictionary advertised in magazines? A. Extensively. I have done a good deal of it myself.

Q. 61. Have you seen Webster's dictionaries advertised in catalogues of mail order houses? A. Sears-Roebuck & Company, John M. Smyth Company, Cash Buyers' Union, the Book Supply Company, Sims, Wilson & Sims—all of whom do a very extensive mail order business and issue millions of catalogues a year. One of the concerns alone, Sears-Roebuck & Company issue approximately seven million—

7154

MR. HALE: I object to the witness stating what is obviously a matter not within his own personal knowledge, but pure hearsay or surmise.

7155

A. (Continuing). Have devoted space equal to a full page—from that down to a quarter of a page, exploiting Webster's dictionaries, some of which have been published by G. & C. Merriam Company, but most of which were published by other houses.

MR. HALE: The last statement is objected to as a mere conclusion of the witness

7156

Q. 62. Have any or all of the forty publishers of Webster's dictionaries whom you have listed advertised their books by means of canvassers?

A. Not all. Some of them were published so long ago that I never heard of them until I got that list from the copyright office at Washington,

7157

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In fact, some of them were published before I was born. Those that I know of have exploited their publication by every means at their command.

7158

Q. 63. Will you name now those publishers who have used canvassers to your knowledge? A. That is a very difficult matter to do, for the reason that a publisher may have on his books—I am applying it to myself—a certain list of customers and dispose of their books in any manner they see fit, irrespective of whether it is over your counter, as a premium or by canvassing. I believe it to be impossible for any publisher to tell definitely just what method was adopted to dispose of the publication after they left his hands.

7159

Q. 64. From your own experience in advertising Webster's dictionaries, are you familiar with the prices charged by various newspapers and magazines for their advertising space? A. I could not give you the rates at this moment or at this time, because during the past four years I have not followed that; but prior to that I was perfectly familiar with them.

7160

Q. 65. Can you, therefore, estimate the cost of the advertising which you have personally seen inserted in various advertising mediums by other publishers than G. & C. Merriam Company, since you have been observing this advertising?

MR. HALE: Objected to as incompetent, irrelevant and immaterial, and as calling for a mere guess or conclusion of the witness, and not for any facts within his knowledge.

A. I would like to amplify my last answer by this statement: That newspaper rates and mag-

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azine rates have, generally speaking, increased. One such instance is the *Ladies' Home Journal*. Another is the *Saturday Evening Post*; and so on through a long list of publications. Any estimate that I would make at the present time as to the value of advertising that I have seen in the past five years would be very much less in my judgment than the actual amount of cash which would be necessary to expend to purchase it, and basing my belief on my former knowledge and my present knowledge of the increase in the cost of advertising in newspapers and magazines, I should say that not less than five million dollars worth of it have been under my observation.

7162

Q. 66. This five million dollars which you speak of is advertising of other publishers than the complainant in this suit? A. Every penny of it. I have seen some of the Merriam's advertising, and I eliminate that from the estimate. I have seen very little of Merriam's advertising as compared with the others, however,—a very small percentage.

7163

Q. 67. Was much of this advertising before approximately 1890? A. Not a great deal of it. Some; but not a great deal of it.

Q. 68. Did the volume of advertising in connection with Webster's dictionaries increase materially about 1890? A. By leaps and bounds.

Q. 69. What was the occasion of that? A. The copyright having expired on a certain Webster's dictionary, the field was open for any who wished to engage in its publication, and it was exploited from coast to coast.

7164

Q. 70. Did you observe the advertising of the G. & C. Merriam Company prior to 1890? A. Yes.

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7165

Q. 71. Had it been extensive?

MR. HALE: Objected to as calling for a mere conclusion, of a hostile witness.

A. Not so far as my observation is concerned.

Q. 72. Would you have observed it if had been extensive? A. I have no doubt I would.

7166

MR. HALE: The answer is objected to as a mere guess, and motion is made to strike it out.

7167

Q. 73. What do you think the reputation of the word "Webster" to-day—if it had any in the minds of the general public—depends upon? A. It depends somewhat upon the work of Noah Webster. It depends very largely upon the amount of advertising that has been done for Webster's dictionaries by publishers other than those who at one time had a monopoly on its publication.

7168

Q. 74. Do I understand you to say that one publisher ever had a monopoly in the publication of any Webster's dictionary? A. During the life of any copyright of any one book, the publishers may have a monopoly. The first Webster I know of was published in 1806. The next one I know anything about was published in 1807. So at least for one year between 1806 and 1807 a monopoly existed in the publication of Webster's dictionary, so far as my knowledge is concerned. There may have been some competition even at that time.

Q. 75. Was that what you are referring to? A. Exactly. Certainly there was no monopoly at the time the Webster's dictionary was taken over by the G. & C. Merriam Company, the right to Web-

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ster's name on a title to a dictionary having expired nine years before they became interested in its publication.

MR. HALE: The last answer is objected to as incompetent, irrelevant and immaterial, and because not based upon facts within the knowledge of the witness, but merely his own argumentative statements of his conclusions.

7170

A. (Continuing). I may add that the statement is based upon a pamphlet issued by G. & C. Merriam Company stating the time they took over the publication of Webster's dictionary from his executors in 1843 or thereabouts, the copyright having expired on the first dictionary nine years before that date.

Q. 76. Have you made any attempt to introduce your dictionary in the schools? A. Some:

7171

Q. 77. Can you name any large cities where your dictionary is approved by school boards and distributed to the schools? A. Cincinnati, Philadelphia, Yonkers and doubtless others, the names of which have escaped me or with which I am not familiar, because I paid no attention to that during the last four years.

Q. 78. What was the title of the book which was introduced in these schools? A. Webster's Universal or Webster's Imperial; I don't know which title was selected.

7172

Q. 79. When was your book introduced in the City of Yonkers in the schools? A. Prior to 1908.

Q. 80. After the book was introduced, did a representative of the G. & C. Merriam Company

7173

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approach the president of the Board of Education in Yonkers and attempt to have the book thrown out? A. Correspondence along that line was indulged in between the Merriam Company and the superintendent.

7174

Q. 8. When the books which were originally purchased by the Yonkers School Board were worn out, what book did they replenish their supply with? A. Webster's Imperial Dictionary. They were perfectly satisfied with the first ones they had. They bought more of them.

Q. 82. This was after the correspondence with the G. & C. Merriam Company? A. After the correspondence with the G. & C. Merriam Company, and after the publication of the latest edition of Webster's International Dictionary by G. & C. Merriam Company.

7175

Q. 83. Are you familiar with the advertising of the Saalfield Publishing Company of Akron, Ohio, in connection with the Webster's dictionaries published by them? A. To some extent.

Q. 84. Can you state approximately what that advertising has cost?

MR. HALE: Objected to as irrelevant and immaterial.

7176

A. I can state approximately what that has cost, the figures in connection with which I have seen; but I should say that it was not—that that figure was not more than twenty-five or thirty per cent of the total because I have not seen the complete figures. But those I have seen would indicate an expenditure of approximately \$25,000, and there may have been three or four times as much as that.

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7177

Q. 85. But that much you are sure of? A. Yes.

Q. 86. \$25,000? A. Approximately that.

Q. 87. Did you make any particular effort to introduce your book in the schools? A. Yes, for a time only. . Then I traveled along the line of least resistance and sold more books.

Q. 88. Then, for the latter part of the time when you were actively engaged in the publication of Webster's dictionaries, you did not make any special effort to have them introduced in the schools? A. Personally, no; but I had men who were selling the books to schools, and school teachers in the various cities.

7178

CROSS EXAMINATION by Mr. Hale:

x Q. 89. You are the Mr. Ogilvie who was engaged in litigation with the Merriam Company in the First Circuit of Boston? A. I am the Mr. Ogilvie who brought a suit against the Merriam Company in the First Circuit.

7179

x Q. 90. And the defendant in the cross bill in that suit? A. And the defendant in the cross bill.

x Q. 91. Did you also publish a Webster's dictionary which was involved in the suit of the Merriam Company against the Texas Siftings Company some time back in the year 1893, about?

MR. CARROLL: Objected to as irrelevant and immaterial.

7180

A. I cannot see that that has anything to do with this matter.

x Q. 92. Never mind about that. Did you publish that book and are you the Ogilvie referred to by name in the opinion of Judge Shipman in

7181

George W. Ogilvie—Cross.

that case? A. Are you asking me to draw a conclusion, or to state a fact, because I don't know anything about the opinion rendered by Judge Shipman. If you will permit me to read it, I will perhaps be able to answer the question.

x Q. 93. Did you publish the Webster's dictionary involved in that suit? A. I have answered that question.

7182

x Q. 94. Please answer it once more? A. I cannot see that it has any bearing on this matter.

MR. HALE: The answer is objected to as not responsive and motion is made to strike it out.

x Q. 95. The question is repeated? A. The answer is repeated.

7183

x Q. 96. Is that the only answer you will make to that question? A. That is the only answer I will make to that question until I know more about what the question implies. If you can produce the dictionary I can tell you whether that is the dictionary I am publishing. I am not going to make any definite statement about something about which I am not certain.

x Q. 97. You know something about that suit, do you not? A. I know something about many of these suits started by G. & C. Merriam Company.

7184

x Q. 98. Do you remember the suit against the Texas Siftings Company? A. I remember that there is a record of such a suit.

x Q. 99. And is that all you remember about it? A. No. I have a very distinct recollection that the suit started by G. & C. Merriam Company at that time was rather expensive for a number of publishers who had a right to do what they were doing, and the Courts so decided.

x Q. 100. Did the Court so decide in the Texas Siftings case that the defendant had a right to do what it was doing? A. The Court decided in the Texas Siftings case, if my memory serves me correctly, that the publishers—the Court did not decide that the publishers had done anything which they were not entitled to do, but did decide that Texas Siftings had made statements which were not within their rights; but none of the odium cast on Texas Siftings was shifted by the Courts to any of the publishers who were publishing Webster's dictionaries at that time. Now, that is from memory, and I think it is correct.

7186

x Q. 101. Are you willing to say now whether you published the book that was involved in that litigation? A. If you will produce the book—I will tell you whether I published it.

x Q. 102. Did you supply Texas Siftings with copies of the Webster's dictionary published by you at that time? A. I did.

7187

x Q. 103. Are you the Ogilvie referred to by the Circuit Court of Appeals in Boston in the following language:

“The Ogilvie circulars and advertisements are misleading and deceptive and show an intention on the part of Ogilvie to trespass upon the reputation of the Merriam Company and to deceive purchasers into buying his dictionary for one of the series of Webster's dictionaries published by the Merriam Company. The purpose of Ogilvie was to put out such a publication and such circulars and advertisements as would lead the public into the supposition that they were buying the Webster's dictionary as improved and added to by the Merriam Publishing Company. He purposely used words of description calculated to

7188

7189

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lead the ordinary purchaser to suppose that he was getting the publication which had been built by the Merriams." Are you that Ogilvie? A. If your client is the same one to which the Court in the same decision referred, when they said that you had illegally interfered with my business, I am that Ogilvie.

7190

x Q. 103. Are you that Ogilvie without any ifs, ands or buts? A. As I don't smoke I am not a picker up of butts.

x Q. 104. Are you that Ogilvie? A. You have got my answer.

7191

x Q. 105. In estimating the extent and value of advertising of Webster's dictionaries not published by the Merriams, did you include the advertising matter thus described by the Circuit Court of Appeals in Boston? A. I am not a Yankee, but I would like to answer your question by asking another—do you think so?

x Q. 106. Do you know what you included in your estimate? Did you include that advertising?

MR. CARROLL: I object to that question as—

A. I am just framing a reply to that, Mr. Carroll—

7192

MR. CARROLL: (continuing) as purely hypothetical, and on the ground that this witness cannot tell what advertising was referred to or what particular circular the Court had in mind when it made those statements.

A. (No answer).

x Q. 107. I am waiting for an answer. Please answer the question. A. You cannot drive me in—

to answering questions before I get ready to answer. Just read that question again.

x Q. 108. (Question repeated as follows:) Do you know what you included in your estimate? Did you include that advertising? A. That advertising comprised about one inch of matter that was inserted in a circular after your partner had been to Chicago and tried to bribe my editors to steal editorial copy of my book.

MR. HALES The question of the witness is objected to as incompetent, irrelevant, immaterial and scandalous,—impertinent and scandalous.

THE WITNESS: But true.

MR. HALE: A motion is made to strike it out.

THE WITNESS: And it being only about one inch in a ten-inch circular, it was circulated for a limited time and discontinued immediately upon its being drawn to my attention, and before the Court had any opportunity to pass upon it, when it was being circulated. It is not included in the estimate.

x Q. 109. Please quote the language to which you refer as having been comprised within one inch? A. Have you the circular?

x Q. 110. I don't know to what circular you refer? A. Yes, you do. 7196

x Q. 111. All of your advertising in that suit was enjoined? A. It was not, and you know it.

x Q. 112. Did you include in that estimate the advertising issued under the name of Saalfeld in connection with the dictionaries copyrighted by you? A. In what estimate?

7197

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x Q. 113. The estimate of the amount spent for advertising by publishers other than the Merriams? A. I did not.

x Q. 114. You included none of the Saalfield advertising? A. I don't believe I could give—just half a minute. Will you read that question again. I thought you referred to the amount of money I had expended.

7198

x Q. 115. (Question repeated as follows). Did you include in that estimate the advertising issued under the name of Saalfield, in connection with the dictionaries copyrighted by you? A. No, I did not.

x Q. 116. Why not? A. Because I had in mind newspaper advertising and not circulars.

7199

x Q. 117. Are you aware of the fact that the Circuit Court of Appeals in the Sixth Circuit, sitting at Cincinnati, has directed an injunction against the Saalfield advertising of your dictionaries? A. Have you a copy of the decision of the Court with you? Then I will be able to answer the question.

x Q. 118. I asked you if you are aware of that fact? A. Possibly I don't understand your question. If you will kindly repeat it or have it read I may be able to answer it.

7200

x Q. 119. Have you any knowledge or information as to whether or not the Circuit Court of Appeals of the Sixth District, sitting at Cincinnati, has directed an injunction against the advertising matter issued by Saalfield in the advertisement and sale of the dictionaries copyrighted by you? A. Do you refer to the suit that was started against Saalfield by you, representing the Merriam Company, in which you claim the right to the use of the word "Webster" after injunc-

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7201

tion restraining them from that right. Is that the suit you refer to—yes, there is such an injunction.

x Q. 120. Did that have anything to do with your estimate of the advertising matter of the amount spent by other publishers? A. It did not.

x Q. 121. Did you include in your estimate of that amount the fraudulent advertising enjoined by Judge Shipman in the Texas Siftings case? A. Mr. Hale, your question is an insult, and you intend to imply in that question that I had something to do with the advertising enjoined by Judge Shipman in the Texas Siftings case, and you know perfectly well that nobody had anything to do with it connected with Ogilvie, and you want to be damn careful about how far you go. If you ask me proper questions you will get proper answers, but I don't want you to get over the line, or I will.

7202

x Q. 122. (Question repeated). Did you include in your estimate of that amount the fraudulent advertising enjoined by Judge Shipman in the Texas Siftings case?

7203

MR. CARROLL: I object to the form of the question as calling for a conclusion of the witness and as being couched in improper and unfounded language, and assuming a state of facts not proven to exist, and on the further ground that it has not been shown that this witness had any knowledge or information about any advertising in connection with the Texas Siftings case.

7204

A. Do you want an answer to that question different from the one which I gave you before.

x Q. 123. Please answer the question? A. I had

7205

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not in mind the Texas Siftings matter at all when I made my estimate. I think the amount could be increased if it were included.

x Q. 124. Do you still own the copyrights of the dictionaries published under the name of "Webster" of the Saalfeld Company? A. The record in Washington will show that better than any information I can give you.

7206

x Q. 125. You know what you own and what you don't own. Do you own those copyrights? A. I cannot see that that has anything to do with this particular case, and I refuse to answer.

x Q. 126. It is not necessary for you to see whether it has anything to do with this case? A. It will be necessary for me to see before I can give you any information about what I own and what I don't own individually.

x Q. 127. Do you refuse to answer the question? A. You have my answer.

7207

MR. HALE: The answer of the witness is objected to and motion is made to strike it out, and the Special Examiner is requested to certify this question to the Court for a ruling as to the propriety of the question and the duty of the witness to answer it.

7208

x Q. 128. What is the general nature of the arrangement between you and Saalfeld for the publication of the dictionaries copyrighted by you?

MR. CARROLL: Objected to as incompetent, irrelevant and immaterial, and not within the issues of this case, and not proper cross examination, and obviously at-

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tempting to pry into the relations of this witness with a party not in any way connected with this suit, the matter having in no way having been touched upon on direct examination.

MR. HALE: The question goes directly to the interest and bias of the witness. He has been called to give expert and opinion evidence, and has done so at large. It appears that this witness is himself publishing a dictionary under the name of Webster.

7210

MR. CARROLL: I object to that statement on the ground that it does not so appear in the record anywhere, and on the further ground that he is not doing any such thing.

MR. HALE: It appears that this witness is or has been recently publishing a dictionary under the name of "Webster" which has been involved in litigation and in which injunctions have been granted and directed.

7211

x Q. 129. An answer is insisted upon? A. I refuse to answer. It seems to get under your skin what that contract is.

MR. CARROLL: Mr. Ogilvie don't say anything more, please. Don't let Mr. Hale excite you.

THE WITNESS: No, he hasn't got me excited for a minute. He simply doesn't like the truth.

7212

x Q. 130. Did you prepare or have anything to do with any of the advertising matter issued by Saalfeld?

7213

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MR. CARROLL: Objected to as incompetent, irrelevant and immaterial.

A. I have had nothing to do with Webster's dictionaries, in over four years, in the matter of their sale, exploitation, advertising, or the preparation of anything in connection with them or anything else.

7214

x Q. 131. Did you prepare any part of the advertising matter issued by Saalfeld? A. My answer covers that question.

x Q. 132. The question may be answered yes or no. Will you please answer it that way? A. I will not.

x Q. 133. Why not? A. Because I will answer it in my own way, and I won't have you put words in my mouth answering your questions.

7215

x Q. 134. Will an answer either yes or no be true?

MR. CARROLL: Objected to as having been already fully answered by this witness, and being a mere repetition of the previous question.

A. I have already answered your question.

x Q. 135. Did you organize a concern called the United Dictionary Company some several years ago?

7216

MR. CARROLL: Objected to as incompetent, irrelevant and immaterial.

MR. HALE: Counsel is reminded that this is cross examination, and that the cross examining counsel is entitled to fully show the position of this witness in the controversy as to Webster's dictionaries, and par-

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ticularly his animus toward the complainant in this suit.

MR. CARROLL: I object particularly to any characterization as that made by counsel for the complainant.

THE WITNESS: What makes you think I have?

MR. CARROLL: Mr. Ogilvie, please don't make any comments.

THE WITNESS: I would like to get his answer.

7218

MR. HALE: Take down what he says, please. I want to get every word that drops from the witness' lips.

x Q. 136. I am still waiting for an answer to my last question. Will you please answer it? A. Just repeat the question again.

x Q. 137. (Question repeated) Did you organize a concern called the United Dictionary Company several years ago? A. No, I did not.

7219

x Q. 138. Were you a stockholder in such a concern? A. I was.

x Q. 139. The principal stockholder, were you not? A. No.

x Q. 140. Who was, if not you?

MR. CARROLL: I object to that absolutely, as even outside the wide limit which Mr. Hale has laid down for himself, and obviously going into matter which in no way relates to this suit.

7220

MR. HALE: Attention is called to the delay of the witness in answering questions.

A. I have answered your question.

x Q. 141. (The last question is repeated as fol-

7221

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lows:) Who was, if not you? A. The last question was answered.

MR. HALE: Read the last question.

7222

x Q. 142. (Question repeated as follows:) who was, if not you? A. The question was answered by an objection on Mr. Carroll's part, and I assumed that that was sufficient. If that is not sufficient, I will answer the question. If you wish to ascertain, you will have to go and find the people and ask them. I won't tell you.

x Q. 143. Did that concern have a litigation with the Merriam Company in regard to the publication of a dictionary by it? A. No; the Merriam Company had a litigation with that concern. That concern did not have a litigation with the Merriam Company.

7223

x Q. 144. And the Merriam Company obtained an injunction against the publication of Webster's dictionary offered by that concern? A. The Merriam Company in the first case lost and in the second case won. The opinion of the Circuit Court of Appeals was affirmed by the United States Supreme Court in which—it is the belief of myself and many other people—they departed from the law,—even if it is the Supreme Court. The dictionary in litigation at that time was published without a copyright notice, with the knowledge and consent and under the contract with the G. & C. Merriam Company and you yourself told me that had you been advising the Merriam Company you would not have advised them to publish the dictionary in that form.

7224

x Q. 145. You imported a copy of that dictionary from abroad, didn't you, and proceeded to

photograph it for publication in this country? A. I did not.

x Q. 146. What did you do in that regard?

MR. CARROLL: I object again as utterly completely irrelevant and immaterial, and direct the witness if he chooses to refuse to answer any further questions along this line.

7226

A. Oh, yes. You might go into my great-grandfather's family if you go on, and I don't know much about that.

x Q. 147. You took an active part in that litigation? A. Not the sort of activity you have taken in this. I don't know what you call active.

x Q. 148. You appeared in your own proper person in the Circuit Court in that case, didn't you? A. No, I was not permitted to appear in my own proper person.

7227

x Q. 149. You applied, however, for leave, did you not? A. I did.

x Q. 150. And addressed the Court? A. I attempted to, but you objected to it. You didn't want the truth to be told there any more than you do in other places.

x Q. 151. What part have you taken in the defense of the suit against the Syndicate Publishing Company? A. I think the record will show what part I have taken.

7228

x Q. 152. Are you in any way connected with the Syndicate Publishing Company? A. What do you mean by connected?

x Q. 153. What are the relations between you and the Syndicate Publishing Company?

MR. CARROLL: Please answer.

7229

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MR. HALE: Keep still, Mr. Carroll, please. Don't interfere with my cross examination of the witness.

THE WITNESS: He means if I am connected in a friendly way?

MR. CARROLL: Answer the question, Mr. Ogilvie.

7230

MR. HALE: Take down what Carroll says and take down what I say, please.

MR. CARROLL: Surely.

A. Now, I am not sparring with you. I want to know what you mean by what is my connection with the Syndicate Publishing Company, and I will answer it in just a minute.

7231

MR. CARROLL: Unfortunately, my poor clients have to pay for this record, and I ask you not to make any superfluous statements.

MR. HALE: Please repeat the last question. If you are going to talk to the witness, it has got to go on the record.

THE WITNESS: Repeat that question, please.

x Q. 154. (Repeated as follows). What are the relations between you and the Syndicate Publishing Company? A. Very friendly.

7232

x Q. 155. Is that all you can say upon that subject? A. That is the only relation there is.

x Q. 156. You have no business relation with them whatever? A. No.

x Q. 157. Have you ever had? A. Never.

x Q. 158. Your interest in this suit, then, is wholly voluntary on your part? A. What do you mean by voluntary?

x Q. 159. Have you been paid anything for any-

thing you have done in connection with this suit?

A. No, sir.

x Q. 160. Do you expect to be? A. I do not.

x Q. 161. Did you call upon and interview persons who had made affidavits for complainant in this suit? A. Believing them to have been misled, I did.

x Q. 162. How did you come to do that? A. Because I am familiar with your tactics.

7234

x Q. 163. Did you first go and see someone connected with the Syndicate Publishing Company before doing that? A. I did.

x Q. 164. How much time did you spend interviewing these affiants? A. I cannot say, but all that was necessary.

x Q. 165. About how many days did you engage in that line of endeavor? A. I cannot answer that question. I don't know.

x Q. 166. And you received no compensation of any sort from the Syndicate Publishing Company, for that labor upon your part? A. It was a labor of love.

7235

x Q. 167. And do you regard your testimony here to-day in the same light? A. So far as compensation is concerned, I certainly do.

x Q. 168. Did you personally go to Washington to investigate the records of the copyright office along the lines of your direct testimony? A. That is unnecessary, and I did not. Anyone can get the information they require by communicating with the Copyright Office. The law prescribes a method.

7236

x Q. 169. You did not go to Washington then? A. I did not. A method is prescribed by statute for getting any information required from that office.

7237

George W. Ogilvie—Cross.

x Q. 170. You did not personally see, then, the books referred to upon the library cards produced from the Copyright Office? A. No.

x Q. 171. Have you any relations of any sort with Cupples & Leon Company? A. None.

7238 x Q. 172. You understand the word "relations," now, then? A. I understand a few things that would just as well not go on the record about your attitude and questions, and I am endeavoring to be very broad.

MR. CARROLL: Again I request the witness not to volunteer statements.

x Q. 173. Have you attended any of the sessions before the Examiners where witnesses were examined on behalf of defendants in this case besides this one? A. No.

7239 x Q. 174. You have forgotten, then, attending—
A. Not to the best of my recollection, if I understand what you mean again.

x Q. 175. You have forgotten, then, that you were present in the office of the Syndicate Publishing Company when the witness Donahue was examined? A. Well, I assumed that you were talking about examinations under the gentleman who was just in here to swear me. I know that there have been such examinations, and I thought
7240 you referred to them.

x Q. 176. And you have been present at them? A. I have not been present at them. I was present in the office of the Syndicate Publishing Company when Donahue was examined.

x Q. 177. In this suit? A. In this suit.

x Q. 178. Was that also in the line of your labors of love? A. Yes, or any other line that you wish to figure it out. It was without compensa-

George W. Ogilvie—Cross.

7241

tion, and merely an attempt to see that justice was done, so far as I am able to help anyone to secure it.

x Q. 179. Do you regard yourself as a disinterested witness in this case? A. Absolutely, without qualifications.

x Q. 180. Wholly unbiased? A. Absolutely.

x Q. 181. And no interest in the result? A. None whatever, of any nature in the world, except to see that justice is done. 7242

x Q. 182. And have you made up your mind as to what result would be justice in your view of the case?

MR. CARROLL: Objected to as incompetent, irrelevant and immaterial.

A. Well, that is a pretty broad question. I think I can answer it better after I have read all the testimony on both sides. 7243

x Q. 183. I presume you think justice was done in the Supreme Court case involving the dictionary of the United Dictionary Company?

MR. CARROLL: I object to that question as containing an unfounded presumption.

A. I don't think anything at all about it.

x Q. 184. Do you mean to say that you know?

A. I said that I don't think anything at all about it. Now, you cannot twist my words into some meaning other than that which I give them. 7244

x Q. 185. Was justice done by the Circuit Court of Appeals of the First Circuit at Boston?

MR. CARROLL: Objected to as incompetent, irrelevant and immaterial.

7245

George W. Ogilvie—Cross.

x Q. 186. (Continuing). In your view? A. The Circuit Court of Appeals of the First District in Boston in rendering its opinion, stated as facts some things which were not true, on which there was no evidence whatever, and was purely, in my belief, a misconception of the evidence that had been presented to them.

7246

x Q. 187. You think, then, there was a failure of justice in that suit? A. I think there was a misapprehension of some of the facts and a decision rendered which was honest and which was of so little importance as applied to my welfare, that I didn't appeal from it, and have never appealed from it. You have done all the appealing in that and every other case in which I have been interested.

7247

x Q. 188. Were you content, then, to plead guilty to the finding that you were guilty of unfair competition and intentionally so?

MR. CARROLL: I object again to the form of this question as improper, and the question itself as irrelevant and immaterial.

MR. HALE: The mildest and politest language that counsel knew of was used in the question.

7248

MR. CARROLL: Furthermore, on the ground that counsel for defendant has never heard of anyone pleading guilty in a civil suit.

A. That is just exactly what I was going to say. Shall I answer the question? We both seem to be willing to plead guilty. You had an injunction entered against you and I had one against myself, and although you appealed and appealed and appealed, you were still found guilty.

x Q. 189. Among those library cards, produced from the Copyright Office, I notice the name of Ivison, Blakeman, Taylor & Company. When you produced these cards, did you know whether or not that concern was a licensee and published a Merriams dictionary under an arrangement with the Merriams? A. I would have to see the contract to know anything about their arrangement. I was never a member of the firm of G. & C. Merriam, G. & C. Merriam & Company, or Ivison, Blakeman, Taylor & Company.

7250

x Q. 190. Did you know, as a matter of fact that the book which Ivison, Blakeman, Taylor & Company published under the name of Webster's Handy Dictionary was a book belonging to the Merriam Company? A. I have never seen the book; therefore know nothing about it.

x Q. 191. I notice upon these cards the names of the following publishers, and the following dates, among others:

7251

Lippincott & Company, 1856; Harper & Brothers, 1853; F. J. Huntington & Company, 1840; White & Sheffield, 1839; Mason Brothers, 1857. Have you any knowledge or information as to the fact that the Merriams purchased the book published by those concerns at an early date?

MR. CARROLL: Objected to as assuming a state of facts not proven.

MR. HALE: Well, I will respond to that. The contracts for the purchase of these books have been offered in evidence and are in the record.

7252

A. Do I understand by that question that you had meant that publishers other than Merriams published Webster's dictionaries at that time?

7253

George W. Ogilvie—Cross.

x Q. 192. I ask that the question be repeated. Please answer the question asked. (Question repeated) I notice upon these cards the names of the following publishers, and the following dates, among others:

Lippincott & Company, 1856; Harper & Brothers, 1853; F. J. Huntington & Company, 1840; White & Sheffield, 1839; Mason Brothers, 1857.

7254

Have you any knowledge or information as to the fact that the Merriams purchased the book published by those concerns at an early date? A. I have never seen such contracts.

x Q. 193. Have you ever heard of them? A. Never heard of them.

x Q. 194. Have you forgotten that these contracts were offered in evidence in the case between you and the Merriam Company in the first Circuit? A. I have forgotten a great many things about that. I tried to forget it.

7255

x Q. 195. You have forgotten that fact, then? A. I don't remember having heard of such a contract.

x Q. 196. Do you remember having brought forward these same books published by other publishers at that early day in advance of that suit A. I don't. There were some books brought forward, but whether they were these, I don't know.

7256

x Q. 197. Were not substantially all the Webster's dictionaries of which you have given a list also enumerated in that suit by witnesses for the defendant? A. Until very recently my impression was that the first Webster's dictionary published by anyone other than your clients or some people with whom they were associated, was in 1850; so I could not possibly have reference to the books that were published prior to that date.

x Q. 198. I am referring now to the long list of some sixty-seven or some sixty-nine— A. So am I. We are referring to the same thing.

x Q. 199. Were not the majority of those dictionaries mentioned by witnesses for the defendant in your suit with the Merriam Company? A. I am not certain whether a majority of them were mentioned. Certainly some of them were.

x Q. 200. Under how many names has your book "Webster's Imperial Dictionary" been published? A. I think the book is the best evidence of that fact.

7258

x Q. 201. It has been published under each of the following names, has it not: Webster's Imperial Dictionary, Webster's Universal Dictionary, Webster's New Cosmopolitan Dictionary, Webster's Monarch Dictionary, Clarkson's Dictionary? A. You haven't given the whole list. There are some things even you don't know about that.

7259

x Q. 202. It has, however, been published under the names mentioned? A. I have seen copies of the books published under some of those titles, but not all of them.

x Q. 203. What is your best knowledge, information and belief as to whether it has been published under all of them? A. The books are the best evidence.

x Q. 204. What is your best knowledge, information and belief on that subject? A. I repeat, the books are the best evidence.

7260

x Q. 205. Question repeated? A. Answer the same.

x Q. 206. What other names do you believe that book has been published under? A. The books are the best evidence.

7261

George W. Ogilvie—Cross.

x Q. 207. What other names, please? A. Same answer.

x Q. 208. I cannot find the books, without the names. Please give the names? A. You know enough. The same answer.

x Q. 209. Is that the only answer you will make? That is the only one.

7262

x Q. 210. How many other names? A. The books are the best evidence.

x Q. 211. Is that the only answer you will make? A. That is the correct answer.

x Q. 212. Then you won't assist the Court in arriving at the truth by giving such information as you can?

7263

MR. CARROLL: I object to all this line of testimony as obviously irrelevant and immaterial. The witness has given in his direct testimony two names under which the book appeared. That is sufficient for the record. It is obviously immaterial whether it has been published under other names or not.

x Q. 213. Please answer the question? A. I have answered it.

x Q. 214. When did you say the name "Webster" was first used on the Hurst book? A. I didn't say.

7264

x Q. 215. When was it? A. I don't know.

x Q. 216. Do you know whether or not the Hurst book was previously published under a name of which Webster did not form a part? A. I do not.

x Q. 217. Did you ever have any knowledge or information on that subject? A. If I had, it has escaped my memory.

x Q. 218. To refresh your memory—— A. I have been attending pretty closely to my own business instead of other people's within the last four years.

x Q. 219. Barring of course the Syndicate Publishing Company's business? A. Always barring the business of any men or concern that are unjustly assailed, if I can do a service.

x Q. 220. Do you regard the Syndicate Publishing Company as unjustly assailed in this suit? A. In view of the correspondence of your client with them, and extending for some years prior to the time this suit was instituted, I certainly do. 7266

x Q. 221. You disagree with Judge Cox, then, that the complainant ought to have an injunction in this suit? A. I am not disagreeing with anybody—not even with you.

x Q. 222. Going back to the "Hurst" dictionary—do you not know that that book was published and copyrighted in the year 1878, the copyright title being No. 10,558, and the registry title being as follows: "Hurst American Illustrated Pronouncing Pocket Dictionary of the English language, based on the labors and principles of the latest and best American and English authorities."? A. If that is true, the book is the best evidence of the fact. Are you calling for a conclusion or— 7267

x Q. 223. You don't know that fact? A. If I knew it, I have forgotten it. 7268

x Q. 224. Is your memory now refreshed? A. No; I don't remember it at all.

x Q. 225. Yes, that was testified to in the suit between you and the Merriams in the First Circuit?

7269

George W. Ogilvie—Cross.

MR. CARROLL: Testified by whom?

MR. HALE: By the witness Allen.

A. Oh, your Allen. You refer to the witness from the F. & G. Merriam Company.

x Q. 226. I do. A. He might have testified to almost anything. He had testified to a great many things of which I am not familiar.

7270

x Q. 227. That does not refresh your recollection? A. Not at all. I disregarded Mr. Allen's testimony. I thought it was wholly useless anyway, and the Court so concluded.

7271

x Q. 228. I will further refresh your recollection by stating to you that that same book was copyrighted, as appears by the records of the Copyright Office under the following name: Date, 1873, the American Diamond Pronouncing Dictionary of the English language. Date, 1879, The Unique Pronouncing Dictionary of the English Language. Date, 1879, the American Popular Dictionary. 1880, Hurst's American Illustrated Pronouncing & c. Dictionary; 1882 The Favorite Pictorial Defining and Pronouncing Dictionary, Date, 1882, the New American Dictionary of the English Language. Date, 1882, The American Comprehensive Lexicon of the English Language.

7272

MR. CARROLL: I object to this question and protest against any such list being given here, as no proof having been introduced anywhere in the record as to any such books or any such copyrights and there being no assurance in any way that these books are not invented for the occasion.

MR. HALE: I will respond to that. The records of the Copyright Office are easily

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7273

produced, and there is no question of invention. Complainant cannot introduce evidence while defendant is taking proofs; and it is strictly proper to call the attention of the witness on cross examination to such matters.

x Q. 229. (Continuing) Also, 1880, *The Handy Reliable Dictionary of the English Language*. Do you have any information as to whether or not the book referred to by the Hurst book was or was not published at those dates under the names specified?

7274

MR. CARROLL: Objection resumed, and on the further ground that it is irrelevant and immaterial.

A. They may or may not have been. The practice of changing titles for the same book is one that has been indulged in by many publishers including G. & C. Merriam Company, as applied to a dictionary of the English language. You have reference to Webster's school and office dictionaries. If you have known of that, take any other name of which the name "Webster" did not form a part. I was not its publisher.

7275

x Q. 230. I didn't ask you that. I asked you if you ever knew of that book under any other name, of which Webster did not form a part? A. If I did, I have forgotten it. I have not attempted to keep track of any of these changes in titles or the books involved in the litigation. You cannot get me to make any definite statement in regard to it, unless I have the books right before me to refer to.

7276

x Q. 231. But, to refresh your recollection, I

7277

George W. Ogilvie—Cross.

ask you if you don't know that the book which you have called Webster's School and Office Dictionary had been previously published under the name of Balch's Compendium? A. Same answer.

x Q. 232. Did you know that fact? A. Same answer.

x Q. 233. Did you know that fact? A. Same answer.

7278

x Q. 234. I suppose you will make the same answer to similar questions in regard to other books? A. Exactly. If you will produce the books, I will be very glad to answer that, but I am not going to depend upon my memory when I am under oath, except where I do actually remember things.

7279

x Q. 235. You have mentioned Saalfeld and Ogilvie as being among publishers of dictionaries using the name Webster which were not published by Merriam. Saalfeld now publishes the books previously published by you, does he not? A. The ones which the Court has determined to be in conformity with the law, he publishes now.

MR. HALE: The answer is objected to as not responsive.

THE WITNESS: It is responsive, because he does not publish all of the Webster's dictionaries that I formerly published. It is an accurate answer.

7280

x Q. 236. Which ones does he not publish? A. Hill's Vest Pocket Webster.

x Q. 237. Who publishes that now? A. I have already stated, and will again—David McKay.

x Q. 238. What other dictionary formerly published by you is now published by Saalfeld? A. That is the only one.

x Q. 239. Among the other abridged dictionaries which you have mentioned in your list, are they all reprints of the 1847 edition, except your own Webster's Imperial Dictionary, and the same book under other names? A. Yes.

x Q. 240. You mentioned the Hampden Publishing Company. Did you know or hear that they had been enjoined and submitted to an injunction? A. I heard that they had refused to spend any money to defend the suit that was brought against them, and in the phraseology of the individual who told me, "laid down."

7282

x Q. 241. Can you fix the date of the first use of the name "Webster" upon each and every one of the dictionaries enumerated in the list? A. I cannot.

x Q. 242. You can, however, of your own? A. Approximately—that is, those that I published first; those that were first published by me.

7283

x Q. 243. At whose request did you get this list of books from the Copyright Office at Washington? A. No one requested me to do it.

x Q. 244. You volunteered it? A. I didn't have anyone ask me to do it.

x Q. 245. Did you procure it and bring it to the defendants or its counsel?

MR. CARROLL: I object to that as irrelevant and immaterial.

7284

A. It is procurable; any one can procure it that wants to by sending for it.

x Q. 246. Did you procure the information and the list and bring it to defendant and its counsel?

A. Didn't you see me hand it to the counsel this morning?

x Q. 247. And you did it wholly on your own

7285

George W. Ogilvie—Cross.

motion and without request from anyone? A. Certainly. He didn't ask me for it. I handed it to him. You saw me do it.

x Q. 248. I believe you stated that you had spent something like one hundred thousand dollars in advertising your dictionaries under the name of "Webster;" is that correct? A. I stated it to be correct, and I did. It is correct.

7286

x Q. 249. Did you so state it? A. I certainly did. Your memory serves you correctly—approximately.

x Q. 250. During what period was that approximate amount spent?

MR. CARROLL: Objected to as having been already answered by the witness.

MR. HALE: When, on direct or cross?

MR. CARROLL: On direct. I asked him that in the very first place.

7287

MR. HALE: I will respond to that. That is no reason why it should not again be asked upon cross.

A. 1903 to 1908.

x Q. 251. Have you spent anything for advertising Webster's dictionary since 1908? A. Not a penny.

7288

x Q. 252. You stated you paid Everybody's Magazine \$1,500 on one occasion. When was that? A. That was prior to 1908—at the time the Lawson articles were running. I had two pages in one issue.

x Q. 253. What book was advertised in that issue? A. Webster's Imperial Dictionary.

x Q. 254. Are you a partner or a stockholder in any concern which is publishing or selling a

thin paper edition of Webster's Universal Dictionary? A. I am not.

x Q. 255. Are you in any manner financially interested in the publication and sale of a thin paper edition of Webster's Universal dictionary?

A. I refuse to answer that question. I cannot see that it has any bearing. It is a private matter. If I am, I am not giving my personal affairs to the public, to you, or any other individual.

7290

x Q. 256. The question is a proper question and does not pry into your personal affairs. I am asking you, are you interested in any manner in such a concern?

MR. CARROLL: The question is objected to as irrelevant and immaterial. The witness has already refused to answer it.

A. (No answer.)

x Q. 257. I am waiting for an answer to the last question? A. You had an answer some time ago.

7291

x Q. 258. Please repeat it? A. Same answer.

x Q. 259. Which is, that you refuse to answer? A. I have not refused to answer. I have answered your question in my own way.

x Q. 260. Are you or are you not interested in a thin paper edition of Webster's Universal dictionary? A. I think it is a very fine book. I am interested in all books.

x Q. 261. Are you financially interested in that work?

7292

MR. CARROLL: Objected to on the same grounds, and protest is made against filling the record with repetitions of questions which counsel for complainant knows are irrelevant and immaterial.

7293

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MR. HALE: I will respond to that. The repetition of the question is necessitated by the refusal of the witness to answer plain and simple questions which are obviously relevant, and by his evasive and argumentative replies. Read the last question, please.

7294

x Q. 262. (Question repeated as follows). Are you financially interested in that work?

MR. CARROLL: There is a question on the record but the witness refuses to answer it. That ends it.

7295

MR. HALE: The refusal of the witness to answer is excepted to, and the Special Commissioner is requested to certify the question to the Court for a ruling as to its propriety, and the duty of the witness to answer it.

x Q. 263. Do you know the names of any concerns, handling a thin paper edition of Webster's Universal Dictionary? A. No.

x Q. 264. Did you ever hear of the Riverside Publishing Company of Chicago? A. Yes.

x Q. 265. Do you know whether or not they are handling a thin paper edition? A. They are, to the best of my knowledge.

7296

x Q. 266. Do you know of any other concern handling a thin paper edition of that work? A. I do not.

x Q. 267. Never heard of it? A. Never heard of it.

x Q. 268. Never saw any advertisement of any other concern? A. Never; and the reason I an-

George W. Ogilvie—Cross.

7297

swered no to the question about concerns was because you made it plural instead of singular.

x Q. 269. Have you any knowledge or information as to whether or not the Riverside Publishing Company is the exclusive publisher or distributor of that work? A. That is a contract, I should say, between the publisher and the individual who is disposing of it, and I have never seen any such contract.

7298

x Q. 270. Have you any knowledge or information upon that subject of any sort? A. I think the contract would be the best evidence in that respect, and I have never seen any such contract, if there is one, covering that point; and I am not going to jump at a conclusion about what some people have done fifteen hundred or two thousand miles away from me.

x Q. 271. I asked you what knowledge or information you had?

7299

MR. CARROLL: Objected to as irrelevant and immaterial.

A. I am under oath, and I cannot say.

x Q. 272. Have you any knowledge or information upon that subject? A. You have my answer.

x Q. 273. Have you any knowledge or information upon that subject?

MR. CARROLL: This question is again objected to as irrelevant and immaterial, and on the ground that it has already been fully answered.

7300

MR. HALE: The special Examiner is requested to certify this question to the Court for a ruling as to its propriety and the duty of the witness to answer it. When the wit-

7301

George W. Ogilvie—Cross.

ness has answered the question which the Examiner has been requested to certify to the Court, the complainant will be able to continue the cross examination. He is not able to do so so long as the questions asked remain unanswered.

7302

MR. CARROLL: The witness is tendered to counsel for complainant for completion of the cross examination at this point. Unless he complete it now his examination will be necessarily limited to the particular questions certified to the Court.

MR. HALE: The additional cross examination will be upon the questions certified, and all questions growing out of them. Counsel is unable to proceed further at this time unless this witness will answer the questions.

7303

MR. CARROLL: Counsel for complainant then has finished his cross examination except with respect to the questions which have been unanswered; is that correct?

MR. HALE: Except for these questions, and such cross examination as answers to these questions may lead to.

7304

Complainant hereby gives notice to counsel for both defendants that the depositions on behalf of complainant in rebuttal in both cases will be taken before a Special Examiner, John F. Jennings, at the office of G. C. Merriam Company at Springfield, Massachusetts, on the 9th day of July, at 11 o'clock in the forenoon of that day. Counsel are invited to attend and cross examine such witnesses as may be produced.

Offering of Dictionary Exhibits Pursuant to Stipulation. 7305

In order that you may close here, I will withdraw the request to the Examiner to certify the questions. I don't care whether he answers them or not.

DEPOSITION CLOSED.

Signature of witness waived by consent. 7306

Testimony of defendants in New York closed, except as stipulated.

NEW YORK, MONDAY, July 15th, 1912.

Met pursuant to stipulation and on consent.

Formal notice of meeting waived. 7307

Present: THE EXAMINER.

WILLIAM B. HALE, Esq.,
For Complainant.

LAUREN CARROLL, Esq.,
Of Counsel for Defendant Syndicate
Publishing Company and for De-
fendant Cupples & Leon Co. 7308

It is HEREBY stipulated that the following dictionaries with the name "Webster" in their titles published by Saelfield Publishing Company, Akron, Ohio, may be deemed in evidence and any copies may be produced, without being especially marked, at the final hearing and at any subsequent proceedings in this case:

7309 *Offering of Dictionary Exhibits Pursuant to Stipulation.*

Webster's Encyclopedic Dictionary
 Webster's Universal Dictionary
 Webster's Inter-Collegiate Dictionary
 Webster's Reliable Dictionary
 Webster's Adequate Dictionary, and also

any of the Webster's Dictionaries copyrighted between the dates 1806 and 1840 by Noah Webster.

7310

IT IS ALSO STIPULATED that the following books may be offered and received in evidence without being identified by any witness—

MR. HALE: But subject to all other objections on the ground of incompetency, irrelevancy and immateriality and any special objection that may be taken and reserved to any particular book.

(Continuing stipulation)

7311

Hill's Vest Pocket Webster's Dictionary, by Professor C. M. Stevens, Ph.D., published by George M. Hill Company, Chicago, copyright notice 1889 by George M. Hill Company, No. 1.

Wehman Brothers Latest Vest Pocket Webster's Dictionary, published by Wehman Brothers, New York; copyright notices 1893, 1894 and 1908, by E. E. Miles, No. 2.

7312

MR. HALE: I object to the book and form of the offer and description thereof, as incompetent, irrelevant and immaterial, and because there is no evidence of the facts recited by Counsel.

MR. CARROLL (continuing stipulation):

Peerless Webster Self-Pronouncing Dictionary, George W. Noble, Chicago; copy-

Offering of Dictionary Exhibits Pursuant to Stipulation. 7313

right notice 1899 by Plymouth Publishing Company, No. 3.

Excelsior Webster Pocket Speller and Definer, F. N. Payne, published by Excelsior Publishing House, McKeon & Schofield, proprietors, New York; copyright notice 1892, Excelsior Publishing House, No. 4.

7314

Webster's Pocket Dictionary and Speller, published by William Bulger, Chicago; copyright notice 1895 by William Bulger, No. 5.

Webster's Pronouncing Dictionary of the English Language, published by B. Tennyson Neely, Chicago and New York, No. 6.

Hurst's Webster's Dictionary, published by Hurst & Company, New York; copyright notices 1879 and 1882 by Hurst & Company, No. 7. 7315

A Concise Webster's Dictionary, edited by D. T. Steuart, M. A., published by A. L. Burt Company, New York; copyright notice 1895 by A. L. Burt, No. 8.

Webster's Library Dictionary for Home, School and Office, by Professor C. M. Stevens, Ph. D., published by M. A. Donohue & Company, Chicago; copyright notice 1911 by M. A. Donohue & Company, No. 9. 7316

Webster's American Standard Dictionary, published by Commonwealth Publishing Company, New York; copyright notice 1909 by Commonwealth Publishing Company, No. 10.

7317 *Offering of Dictionary Exhibits Pursuant to Stipulation.*

Webster's School and Office Dictionary, published by Thompson & Thomas, Chicago; copyright notices 1901, 1903 and 1905, all by Thompson & Thomas, No. 11.

7318 Webster's Universal Self Pronouncing Dictionary, Charles Morris, published by John C. Winston Company, Philadelphia and Chicago; copyright notices 1908 and 1911 by John C. Winston Company, No. 12.

MR. HALE: The offer of the last book is especially objected to on the ground that the title has not been correctly stated by counsel, as will appear from inspection of the book, the title being as appears on the backbone of the cover and title page, "Universal Self Pronouncing Dictionary," the word "Webster" and the word "Morris" being printed merely upon the front cover of the binding—

7319

MR. CARROLL: Also the statement appearing upon title page, "Based upon the solid foundation laid by Noah Webster."

MR. HALE: The last remark is also objected to by counsel for complainant: that recital in the title page is no evidence of that fact as has been proved in this case, with special reference to defendants' own dictionary.

7320

MR. CARROLL (continuing stipulation): Webster's Business and College Dictionary, revised and enlarged by Professor C. M. Stevens, Litt. D., published by W. B. Conkey Company, Chicago; copyright notice 1911 by W. B. Conkey Company, No. 13.

Offering of Dictionary Exhibits Pursuant to Stipulation. 7321

Webster's Modern Dictionary of the English Language for Home, School and Office, published by L. W. Walters Company, Chicago; copyright notice 1907, L. G. Stahl; and copyright notice 1908, J. H. Moss, No. 14.

Laird & Lee's Webster's Modern Dictionary, compiled by E. T. Roe, awarded gold medal and diploma Lewis & Clark Centennial Exposition, No. 15. 7322

MR. HALE: I object to counsel reading such statement into the record on the ground that it is incompetent, irrelevant and immaterial and, second, that the recital read from the book is no evidence of the facts recited.

MR. CARROLL: (continuing stipulation) —published by Laird & Lee, Chicago; copyright notices 1895, 1899, 1903, 1905, 1906, all by William H. Lee. 7323

Laird & Lee's Webster's New Standard Dictionary of the English Language, Elementary School Edition, published by Laird & Lee, Chicago; copyright notice 1907, William H. Lee, No. 16.

Laird & Lee's Webster's New Standard Dictionary of the English Language, School Edition, published by Laird & Lee, Chicago; copyright notices 1906 and 1907 by William H. Lee; also entered at Stationers' Hall, London, England, No. 17. 7324

Laird & Lee's Webster's New Standard Dictionary of the English Language, Common School Edition, awarded gold medals and diplomas at World's Expositions, No. 18.

7325 *Offering of Dictionary Exhibits Pursuant to Stipulation.*

MR. HALE: The statement of counsel as to medals and diplomas is objected to as incompetent, irrelevant and immaterial and not evidence of the facts recited, and as secondary.

7326 MR. CARROLL: (continuing stipulation)
—Published by Laird & Lee, Chicago; copyright notices 1903, 1904, 1905, 1907, 1908 and 1911 by William H. Lee; entered at Stationers' Hall, London, England; Déposé au Ministère de l'Intérieur et à la Bibliothèque Nationale, Paris, France.

Laird & Lee's Webster's New Standard Dictionary, Illustrated Library Edition, awarded gold medal leading World's Expositions, No. 19.

7327 MR. HALE: I make the same objection to counsel reading into the record advertising statements as though they were proof of the facts recited.

MR. CARROLL: (continuing stipulation)
—Published by Laird & Lee, Chicago; copyright notices 1903, 1904, 1905, 1907 and 1908 by William H. Lee; entered at Stationers' Hall, London, England, and Déposé au Ministère de l'Intérieur et à la Bibliothèque Nationale, Paris, France.

7328 Laird & Lee's Webster's New Standard American Dictionary, Encyclopedic Edition, published by Laird & Lee, Chicago; copyright notice 1911 by William H. Lee, No. 20.

Offering of Dictionary Exhibits Pursuant to Stipulation. 7329

Webster's Condensed Dictionary by Dorsey Gardner, with the following imprint—

Chicago

Reilly & Britton Company.

Springfield, Mass.; G. & C. Merriam Company.

1910,

copyright notices 1884, 1906 and 1909 by 7330
G. & C. Merriam Company. No. 21.

IT IS STIPULATED that the 20th Century Edition of Webster's Pronouncing Dictionary may be deemed in evidence and produced at final hearing.

An American Dictionary of the English Language, Noah Webster, published by Harper Brothers, 1846, New York, bearing upon its back-bone the title "Webster's Dictionary" and bearing copyright notice 1829 by Noah Webster and Joseph E. Worcester; 1841 by Noah Webster. No. 22. 7331

MR. HALE: The complainant has no objection to the offer of the book last produced or to the Webster's Condensed Dictionary offered.

As to the remaining dictionaries, Complainant objects; first, that they are offered as independent books, whereas it appears from inspection that some of them, at least, are the same identical book having the same literary contents and the only difference being in the titles given to them; an illustration of which is the so-called Webster's Business and College Dictionary bearing the publisher's imprint, W. B. Conkey Company, and copyright notice 1911. So far as comparison at 7332

7333 *Offering of Dictionary Exhibits Pursuant to
Stipulation.*

7334 this session by Counsel could demonstrate, it is the same identical book as offered under name of Webster's Modern Dictionary of the English Language, 1910 Edition, with the imprint published by the L. W. Walters Company, Chicago, and bearing copyright notice dated 1907, L. G. Stahl, and 1908, by J. H. Moss. Attention is called to the fact that not only is the vocabulary identical but even the prefatory pages in it and the table of contents and the paging are identical.

7335 MR. CARROLL: I object to the statement by Counsel for Complainant that a number of books offered are identical, first on the ground of its indefiniteness and generality and on the further ground that the books themselves are the best evidence, and that Counsel for Complainant's statement is incompetent and no proof of the facts contained in such statement. Counsel for Complainant is requested to point out any other books among those offered which seem to him to be so nearly similar as to merit being called by him "identical."

7336 MR. HALE: So far as a hasty examination made at the counsel table disclosed, the two books referred to were absolutely identical, and the word "identical" and not "similar" is the proper descriptive adjective to apply to them.

7336 Another illustration of this same thing is the "Webster's New Standard Dictionary, Library Edition," and so-called "Webster's New Standard Dictionary, Common School Edition," which appear to have been printed from the same plates, so far as a hasty examination would disclose. There may be others but Counsel cannot point them out without further examination.

Offering of Dictionary Exhibits Pursuant to Stipulation. 7337

MR. CARROLL: Objection is made to the statement by Complainant's Counsel "there may be others."

MR. HALE: The books are in evidence and it will be pointed out in the brief and argument which are identical.

Further objection is here made that the reading of the various title pages, prefaces, etc., is not sufficient proof and that it is not evidence of the truth of the facts recited. 7338

It is further objected, that in all these dictionaries the certificates of copyrights referred to by the dates of the copyright notices have not been produced, thus showing with certainty the name under which the books were copyrighted at the time specified and it is objected to on the ground that there is no evidence that particular books bearing the name "Webster" and earlier copyright notice have always borne the name "Webster" at the time they were copyrighted or that the name appeared in the title at the time they were registered. Specific illustration of this is the so-called "Hurst's Webster's Dictionary," which bears copyright notices dated 1879 and 1882, as to which it will appear upon inspection of the records in the Copyright Office that the title registered at this date was "American Popular Dictionary," in which the name "Webster" did not appear, and there is no evidence as to the time when the name "Webster" was so added to this book. 7339 7340

MR. CARROLL: Objection is made to the last statement of Counsel for Complainant on the ground that it is incompetent and no proof at all of the alleged fact contained therein.

7341 *Offering of Dictionary Exhibits Pursuant to Stipulation.*

7342 MR. HALE: Another illustration of the objection and the objection is specifically pointed to the book offered in evidence as "Webster's School and Office Dictionary," bearing copyright notices Thompson & Thomas, 1901, 1903 and 1905, and the book offered bearing the publisher's imprint dated 1909. The title page, also bearing the statement "taken from authority of Noah Webster, revised and enlarged Edition." It is specifically objected to this book, that there is no evidence as to when the name "Webster" first appeared upon it, and it will appear by a book which Complainant will offer in evidence as part of its rebuttal testimony that this same identical book was previously published under a name in which "Webster" formed no part of the short title of "Balch's Compendium" or "Balch's Handbook," and reference is made to the copyright number 15857, which is stamped upon this book in the Copyright Office, the full copyright name being "The People's Dictionary and Everyday Encyclopedia comprising any information needed on any subject in daily use."

7343

7344 MR. CARROLL: Protest is made on the record against this attempted method of proof by Counsel, for Complainant. It is obviously incompetent and is further objected to as irrelevant and immaterial. The contents of a copyright certificate, etc., cannot be properly referred to by Counsel for Complainant without producing and offering the same in evidence.

MR. HALE: Complainant was merely pointing objection to the insufficiency of

Offering of Dictionary Exhibits Pursuant to 7345
Stipulation.

Defendants' proofs along this line and giving illustrations, all of which were references where the point of the objection might be verified.

MR. CARROLL: Subject to the objections noted, said Dictionary Exhibits are offered in evidence, received in evidence and marked respectively Nos. 1-22, together with the date and initials of the Examiner. 7346

Testimony on behalf of defendants in New York closed.

Printing of Standing Examiner's certificate is omitted by consent.

ADJOURNED. 7347

7348

1838

7349

DISTRICT COURT OF THE UNITED
STATES,

SOUTHERN DISTRICT OF NEW YORK.

G. & C. MERRIAM COMPANY,
Complainant,

vs.

Equity
8-161.

7350

CUPPLES & LEON COMPANY,
Defendant.

G. & C. MERRIAM COMPANY,
Complainant,

vs.

Equity
8-162.

7351

SYNDICATE PUBLISHING COMPANY,
Defendant.

SPRINGFIELD, Mass.,

June 28, 1912.

2:30 o'clock P. M.

APPEARANCES:

7352

The Special Examiner,
JOHN F. JENNINGS.

WM. B. HALE, Esq.,
For Complainant.

LAUREN CARROLL, Esq.,
For both Defendants.

John W. Nolan—Direct.

7353

Depositions taken in behalf of Defendants for final hearing, pursuant to notice annexed, before John F. Jennings, Esq., a Special Examiner of this Court, pursuant to the 67th Rule in Equity, as amended, at the office of John F. Jennings, in the City of Springfield, Massachusetts, at 2:30 o'clock P. M.

It is hereby stipulated that the depositions of the witnesses to be called in Springfield shall be taken down stenographically by a skilful stenographer, to be selected by the Special Examiner, and subsequently transcribed and reduced to type-written form for the use of the Court. 7354

JOHN W. NOLAN, a witness called by and on behalf of the defendants, having been first duly cautioned and sworn, testified as follows:

7355

DIRECT EXAMINATION by Mr. Carroll:

Q. 1. Give your full name. A. John W. Nolan.

Q. 2. Age? A. 42.

Q. 3. Residence? A. 96 Franklin Street.

Q. 4. Springfield? A. Yes, sir.

Q. 5. Occupation? A. Circulation manager of the "Springfield Union."

Q. 6. How many years have you been Circulating Manager of the "Springfield Union?" A. Down for the last seven years—I have been in the Circulation Department nearly twenty years, full charge about the last six or seven, but I had nearly all the circulation to look after previous to that. 7356

Q. 7. Can you mention any plans or schemes that have been used by you during that period to

7357

John W. Nolan—Direct.

7358

increase the circulation of the "Springfield Union?" A. Yes, we have used several different schemes, some of them along the coupon line, whereby we advertised in the paper and stipulate that the subscriber in order to obtain the premium must get one or more coupons from the paper and pay whatever price is decided upon for the premium. We, of course, have used other schemes in connection with the house to house canvasses, trying to obtain new subscribers in that way. We have also used advertising in the paper to advertise certain premiums where we didn't use the coupon, but asked the subscribers to agree to take the paper for a certain length of time, usually from three to six months to a year. These are the three forms mostly used for obtaining circulation.

7359

Q. 7. Do you remember a particular scheme known as the "Dot" plan? A. Yes, I do.

7360

Q. 8. Will you describe that? A. That was one of our most popular contests. The plan was to put so many dots into a given space. For instance, we would use a space two columns wide and three to four inches deep, just fill that blank space with dots, then ask the reader to count the number of dots and send in their answer with a remittance for one month's subscription for each count they wished to submit. We received thousands on the "Dot" contest, thousands of subscribers, in fact I think it was one of our most popular contests that we ever ran.

Q. 9. Did some people take more than one chance? A. As a rule, most people took more than one chance. Of course, on their first count, they would usually run through it very rapidly, and on their second count, which showed a dif-

ference from their first they naturally would suppose their second or any succeeding counts they made were correct, and in order to be on the safe and sure side, would enclose 50 cents more to send in another survey. In some cases the subscribers would send in from six to a dozen and in one case there was one subscriber who sent in answers enough with remittances for each answer to cover a period of subscription for two years.

Q. 10. Whose idea was this plan? A. That was an outsider's idea. It was tried first on one or two small papers and we heard of the interest and excitement it created in that immediate locality and we immediately got in touch with its promoter and after talking matters over with him we took on the proposition.

Q. 11. Did he have it patented? A. Yes, he did.

Mr. Hays: Question and answer is objected to, as calling for the conclusion of the witness and because such a scheme cannot be patented.

Q. 12. You paid him specially for the idea? A. Yes, we paid him for the privilege of running it.

Q. 13. Was there any scheme known as the "Pony Contest"? A. Yes, there was a "Pony Contest". That was in a way an entirely different proposition, but another means to increase circulation. We offered two Shetland Ponies to the child receiving the most votes, as we call the "most popular" child. Of course, this interested every boy and girl, not only in Springfield, but in the surrounding territory, and their relatives and friends got out and interested, and made, of course, a very thorough canvass of the entire

7365

John W. Nolan—Direct.

district. Of course, a number of people were canvassed from one to a thousand times in favor of the different candidates. The plan of that was to allow so many votes for each paid-in-advance subscription that was turned in, number of votes varying from one month up to one year. The plan was unusually successful, attaining thereby a large number of new subscriptions and which were all paid for in advance.

7366

Q. 14. Whose idea was this "Pony Contest"?

A. That was an outsider's. They hired an outside man, who made Pony Contests his specialty among the newspapers of the country.

Q. 15. Did you also have a "Flag Scheme"?

A. We had a "Flag Scheme" which we used exclusively by advertising through the columns of the "Union."

7367

The terms of the "Flag Proposition" were that any person could obtain a flag by subscribing for the "Union," either the morning or evening edition, for a period of three months, paying in advance for the same, and also paying one dollar additional for this flag, which consisted of the pulley, rope, halyard, also a bracket in which to place the flag—in fact, the outfit was complete. That was a very successful proposition.

7368

Q. 16. Whose idea was that? A. That was really our idea. We could use the flag in a number of different ways, but I decided we would try it out that way. I might say in addition to that we used the flag as a premium among the boys who were selling papers, offering them a flag complete if they would bring in ten new subscribers, and that was equally successful. The boys got out and hustled, brought in their subscribers

and were very much pleased with the flag, thought it was a good thing to have and thought they got it pretty easy.

Q. 17. Did you use a phonograph proposition?

A. Yes, the phonograph was a very successful proposition. That was first used in the West. We heard of it from a man named Swift, I think. We made arrangements with him. He was in the premium business at that time—

7370

Q. 18. Was that the same Swift who is now connected with the Syndicate Publishing Company? A. I believe so. He is what we newspaper men call a "premium man." That was a very successful proposition; in fact, it was what we considered one of our best.

Q. 19. How did that work? A. That was worked mostly on a canvass. We used that different from some of the other schemes I have mentioned. It was used in connection with a house to house canvass. The subscriber would agree to take the paper for a specified time, paying therefor at the regular rate of 12 cents a week for the daily or 17 cents a week if they took the daily and Sunday, and we issued to them certificates, and they presented that certificate at the office of the Columbia Phonograph Company, and on payment of a certain sum, which was stated in the contract which they signed, the phonograph, with three records, was delivered to them, and that remained in their possession as long as they fulfilled the agreement between the "Union" and themselves by paying for their paper regularly and taking it for the required length of time.

7371

7372

Q. 20. What is the big advantage to the newspaper derived from these schemes?

7373

John W. Nolan—Direct.

MR. HALE: Objected to as irrelevant and immaterial.

A. As a stimulus for circulation. We use everything along that line in order to get new subscribers, and of course after we obtain them we hope to keep them permanently on our list with the features which we use in our paper, both news and other features we may use.

7374

Q. 22. Do you consider these plans increase your prestige? A. I do; I do, very much. We received a number of compliments upon each and every one of these schemes; subscribers of course wonder how we can afford to do it. Of course, our whole idea is to get as many people who are readers of the "Union," regular readers of the "Union," to become regular subscribers.

7375

Q. 24. You also permit the old regular subscribers to come in on these schemes? A. Yes, we always allow the old subscribers the same privilege as is given to any new subscriber, any and all times.

Q. 25. You might say you mean to keep all subscribers as well as get new ones? A. We of course consider our old subscribers our best asset. We want to keep them satisfied, while we are reaching after new ones at all times.

7376

Q. 26. Did you sometime in August last introduce another circulation scheme similar to those outlined, in connection with a dictionary?

MR. HALE: Objected to as incompetent, irrelevant and immaterial and involving a conclusion in the word "similar."

A. Yes.

John W. Nolan—Direct.

7377

Q. 27. What were the peculiar features of that scheme? A. It was the plan of the scheme that any reader of the "Union" by clipping six coupons from the paper and paying 98c could obtain a copy of a limp leather cover dictionary.

Q. 28. What was there particularly attractive about the scheme as outlined?

MR. HALE: Objected to as irrelevant, incompetent and immaterial.

7378

A. It was one of our most popular schemes that we ran. The people seemed,—they wondered how we could put the dictionary out at that price, a book of such good binding, such good paper and weight; also they were pleased with the size of the type. Also a number of them on looking the dictionary over in the office remarked that it was right up to date.

Q. 29. How did they come to the conclusion it was right up to date? A.

7379

MR. HALE: Objected to as incompetent irrelevant and immaterial in calling for the opinion of the witness.

A. Why looking over some of the up-to-date words, for instance, automobile, garage, chauffeur, a number of automobile terms, and other words which they considered of recent origin.

Q. 30. Did you ever have a dictionary scheme before? A. We used several dictionary propositions previous to the one of last August and not one of them was a success. We, several years ago, had one large dictionary, I believe it was published by the Werner Company, called "Webster Dictionary." We put that out in connection with

7380

7381

John W. Nolan—Direct.

7382

a house to house canvass and asked the subscribers to take the paper for a certain length of time, paying therefor at the regular rate of 12c a week, if they took the daily and 17c per week if they took the daily and Sunday, also an added amount, I think it was 4c a week, covering the period that the contract called for. In fact it was what we call the installment scheme. I sent a number of canvassers out making canvass from house to house and they didn't have any success with the dictionary. I wrote—(It was the Saalfeld Company instead of the Werner Company. I believe they are successors of the Werner Company) I wrote the Saalfeld Company and they suggested I was probably not making the right kind of canvass and wanted to know if it would be agreeable to me to let them send on a Manager and let him conduct the canvass. I was willing to be shown, of course, and I told him I would be glad to have them send on a Manager and see what they could do. He came and tried it out and results were no better. The best he could do were two or three or four a day, that seemed to be an outside figure, four, so we gave it up.

7383

Q. 31. Why was it a failure?

7384

MR. HALE: Objected to as incompetent, irrelevant and immaterial in calling for mere opinion of the witness.

A. There were a few of the subscribers who had heard of the dictionary; they called at the office and wanted to go over it, and when we let them see the book, in several instances they looked for some of the more recent words and were unable to find them.

John W. Nolan—Direct.

7385

Q. 32. What was the aggregate price charged for the dictionary alone, irrespective of the subscription money? A. To the best of my belief it was about \$2.00, in the vicinity of \$2.00 on the installment plan.

Q. 33. Do you think the price had anything to do with the failure of the plan?

MR. HALE: Objected to as incompetent, irrelevant and immaterial in calling for the mere opinion of the witness.

7386

A. Yes, it did some.

Q. 34. Covering your experience in the Circulation Department, can you state about what price is the best price for these premiums?

MR. HALE: Objected to as incompetent, irrelevant and immaterial as calling for the mere opinion of the witness.

7387

A. Any price under \$1.00.

Q. 35. Would you call approximately 98 cents a psychological price? A. I would call that very much a psychological price.

Q. 36. In these circulation schemes which you have outlined, what as a fact do you undertake to feature most? A. We, of course, try to have the people think by getting the premiums through us they can do so at a better price than they could buy them outside, that is for the same degree of workmanship on whatever the premium may be.

7388

Q. 37. Is it not a fact that usually they do get the books, or phonographs or whatever it is, at a less price than the whole scheme costs?

7389

John W. Nolan—Direct.

MR. HALE: Objected to as incompetent, irrelevant and immaterial as calling for the conclusion of the witness.

7390

A. Yes, of course we are always willing to spend money for circulation. We always want to increase the number of subscribers and we feel as though we can afford to do so—that we can afford to lose a little on premiums if we can get a new subscriber thereby.

Q. 38. Do you think the public take this into consideration?

MR. HALE: Objected to as incompetent, irrelevant and immaterial and as calling merely for a speculative guess.

7391

A. I think they do from my experience; they look to us for it in a great many cases. Just to give you an illustration: We have had subscribers who have gone in, taken these premiums, and they have immediately gone to the different stores afterwards to find out what the same article would cost, and invariably it is quite a little higher.

7392

Q. 39. You think it an advantage then to feature your own name in connection with these schemes rather than the name of the manufacturer of the particular article you are using? A. Always. We are not out to advertise anybody; we want to advertise the "Union" first, last and all the time, and in all cases say that the "Union" is offering this. We simply make the proposition, whatever that is, secondary to the "Union."

Q. 40. Do you think that the prestige of the "Union" as it exists, assists in selling these premiums? A. There is no doubt of that. Anything that is offered by the "Union" is of course supposed to be good value, and there is no doubt

John W. Nolan—Direct.

7393

that some of these same things, if they were offered by others, they would not sell one quarter, I might say in some instances, one tenth of what the "Union" is able to dispose of.

Q. 41. What was the name of the dictionary which you were using in the circulation scheme which began in August last? A. I believe that was the "Webster". I didn't pay very much attention to that part of it. "The Webster Standard Dictionary," "New Standard Dictionary" or the "Webster New Standard Dictionary" was what we started advertising.

7394

Q. 42. Was that campaign a success? A. Yes, it was very much of a success.

Q. 43. What features in connection with it, do you think contributed most to its success?

MR. HALE: Objected to as incompetent, irrelevant, and immaterial and as calling for a conclusion and the opinion of the witness.

7395

MR. CARROLL: It would seem that this witness should be qualified as a circulation expert to give his opinion.

MR. HALE: That doesn't necessarily make opinion evidence competent.

A. In the first place I think the price of the dictionary was the attraction. After the people saw it, saw the binding, the limp leather binding, the quality of the paper on which it was printed, also the size of the type which was of fair size, (some people were objecting to small type) these were advantages. Also the fact, as some subscribers said, the fact that the book was right up to date, as a number of them called to see the book and looked over some of the up-to-date words.

7396

7397

John W. Nolan—Direct.

Q. 44. Did you receive any letters commending the book? A. We received a number of letters commending the book, and also commending us for our enterprise in being able to put out such a good book at such a cheap price.

7398

MR. HALE: The last question and answer is objected to as incompetent, irrelevant and immaterial and motion is made to strike out the answer. This objection is to apply to all other questions with respect to letters of the time mentioned, and also to the letters themselves, if they are offered in evidence.

Q. 45. I show you eight letters and ask you if these are some of those received by you, commending the dictionary which you were distributing? A. Yes, every one of them.

7399

Q. 46. Now are these unusual?

MR. HALE: Objected to as calling for a conclusion of the witness in addition to the other grounds for objection mentioned.

A. No, they were some that I had taken from our files at random.

7400

The letters are by consent set forth in the record at length subject to the objections noted above and are further objected to upon the further ground that they are incompetent and no evidence at all of the facts recited therein, and are as follows:

August 28, 1912.

“Springfield Union,

GENTLEMEN:

I received the \$4.00 Webster's Dictionary. Am well pleased with it; the type in it is very plain,

1851

John W. Nolan—Direct.

7401

the illustrations in colors, the flexible binding and the very low price that you are putting it out for appeal to me.

I am very pleased with the colored page of Fruits and their Blossoms. The whole book is up to date and is O. K.

Yours truly,

P. O. 241.

L. BEACH,
Chester, Mass."

7402

II.

BELCHERTOWN, Mass., Nov. 3rd.

"We like the Dictionary so much want another, so please find \$1.20 one dollar and twenty cts., for it to be sent to me at Belchertown, Mass.

And greatly oblige,

P. O. Order.

HENRY A. PAINE."

7403

III.

"Thank you for the dictionary and promptness in sending. It is *fine* on first introduction, binding, type and contents, and I am sure will grow quite indispensable on further acquaintance.

JEAN KENDRICK,
Amherst, Mass."

Sept. 8, 1911.

IV.

7404

"So. DEERFIELD, Sept. 6th.

The Union:

I received one of your dictionaries to-day by a friend who called at your office for it. I am very much pleased with it and more than satisfied, and will recommend it to others.

EDGAR P. LEE."

1852

7405

John W. Nolan—Direct.

V.

“SPFLD., Aug. 26, 1911.

C. Dept. Union,

DEAR SIR:

7406

After looking over my purchase of one of your Webster new Standard Dictionary think all the features enclosed appeal to any and all to have such at their command even at a much higher cost. It is a bargain of learning and finance.

Yours Respect.,

F. W. WELLS,
486 Chestnut St.”

VI.

SOUTH DEARFIELD, MASS.,

7407

I like the book and enclose 98c, 22 for postage. I wish to give one to my sister and one *coupon*. Did not have time to get a money order.

MARTHA INGRAM,
So. Deerfield, Mass.

VII.

WALES, MASS., Nov. 15, 1911.

To Springfield Union:

7408

Please accept thanks for the beautiful dictionary. I like the whole book. It is light and handy to handle. A treasury of facts describe it in a few words.

AMY A. HISCOCK.

1853

John W. Nolan—Direct.

7409

VIII.

WILLIAMSBURG, August 18.

MR. EDITORS

I have received the dictionary I sent to you for and am very much pleased with it. I cannot say which feature I like best as it is all good and gotten up in better style than I expected it to be.

Yours, truly,

A. W. ALEXANDER.

7410

Q. 47. Did you have in addition to the regular advertising which you gave to this dictionary, in the last campaign mentioned, what you call "reading notices?" A. Yes, I had reading notices in connection with the regular display advertisements. Sometimes we would run them two or three days in succession and then we would skip a period of days.

7411

Q. 48. What is your usual price for reading notices of this kind?

MR. HALE: Objected to as incompetent, irrelevant and immaterial.

Q. 49. A. 40c a line.

Q. 49. What is your usual price for display advertising?

MR. HALE: Objected to as incompetent, irrelevant and immaterial.

7412

Q. 50. A. 90c an inch.

Q. 50. Was your profit on the dictionaries sufficient to pay for the advertising which you devoted to them?

MR. HALE: Objected to as incompetent, irrelevant and immaterial.

John W. Nolan—Direct.

7413

A. Yes, it was.

Q. 51. Including everything? A. Including everything.

Q. 52. Did you consider the coupons used in connection with this scheme as advertising?

MR. HALL: Objected to as incompetent, irrelevant and immaterial.

7414

A. No, we used the display advertising and reading notices to push the sale of the book.

Q. 53. I show you a collection of newspaper clippings and ask you if you cut them from the files of the "Springfield Union?" A. Yes, I did.

7415

MR. CARROLL: These advertisements are dated respectively August 21, 1911; August 23, 1911; reading notice August 24, 1911; reading notice of September 13th, reading notice of September 14th; advertisements of October 10th, October 14th, October 19th, October 21st; October 26th, both advertisement and reading notice; advertisements of October 27th and October 28th; November 9th, reading notice; and November 11th advertisement.

7416

Q. 54. I show you another newspaper clipping and ask you what that is? A. That was a communication sent to the "Springfield Republican" in regard to the dictionaries which we were offering.

MR. HALL: The answer is objected to as secondary, the documents speak for themselves.

Q. 55. Did you cut that clipping from the "Springfield Republican" yourself? A. I did.

Mr. Cramer: I offer this in evidence, it bearing date of October 1844, 1845.

Mr. West: The clipping from the "Springfield Republican" which has been offered in evidence is objected to as incompetent, irrelevant and immaterial and as no evidence of the facts stated therein; and further, upon the ground that it has in no way been connected with the complaint and is not binding upon the complainant.

7978

Q. 56. I show you Exhibit of October 1844, and ask you to read what is stated at the top of the page in large displayed type?

Mr. West: Objected to as incompetent, irrelevant and immaterial, as the Exhibit speaks for itself and was already in evidence.

7979

A. "This dictionary has been revised and brought up to the present date in accordance with the best authorities; and is not published by the original publishers of Webster's Dictionary nor by their successors."

Q. 57. Does that appear very conspicuously on the page?

Mr. West: Objected to for the same reasons and as calling for a conclusion.

7980

A. It does.

Q. 58. What appears enclosed in a box at the bottom of the page? **A.** "Are all our readers who gained the impression from the Union's announcement that Webster's New Standard Dic-

7421

John W. Nolan—Direct.

tionary, Illustrated' was published by the G. & C. Merriam Company, and purchased it for that reason, may return the book and we will most gladly refund expenses, bonus the amount. Furthermore, any person who obtained the dictionary at the 'Union' office and feels they did not get full value may have money back by returning book in good condition."

7422

Q. 59. Is that contained upon that page in large type?

MR. HALE: Objected to as incompetent, irrelevant and immaterial and as secondary.

A. It is.

Q. 60. Did anyone take advantage of this offer?

MR. HALE: Objected to upon the same grounds.

7423

A. Not one.

Q. 61. Did you have particular charge of the distribution of these dictionaries? A. I did.

Q. 62. If any one had come back with one of the dictionaries, would you have known of it? A. I would.

7424

Q. 63. Did any one, while you were distributing these dictionaries, make any comment about the publisher of the dictionary in any way? A. No.

Q. 64. Did any one ask whether they were published by the G. & C. Merriam Company? A. No, they did not.

Q. 65. Did some of the persons who purchased these dictionaries come back for others?

MR. HALE: Objected to as incompetent, irrelevant, and immaterial.

John W. Nolan—Cross.

7425

A. Yes, there were a number who bought more than one copy.

Q. 66. Have you a record of the sales of these dictionaries on October 18th? A. We have.

Q. 67. What were the sales on that date? A. 27.

Q. 68. Does that include all three styles of binding? A. It does.

Q. 69. What were the sales on October 19th? A. 56.

7426

Q. 70. October 20th? A. 53.

Q. 71. October 21st? A. 91.

Q. 72. October 23rd? Was the 22nd Sunday?

A. I think it was. 60 on the 23rd.

Q. 73. October 24th? A. 53.

Q. 74. October 25th? A. 50.

Q. 75. October 26th? A. 56.

Q. 76. October 27th? A. 50.

Q. 77. October 28th? A. 119.

Q. 78. November 6th? A. 119.

7427

Q. 79. November 7th? A. 124.

Q. 80. November 8th? A. 238.

Q. 81. November 9th? A. 397.

Q. 82. November 10th? A. 446.

Q. 83. November 11th? A. 894.

Q. 84. Was November 11th the close of the campaign? A. Yes, that was the closing date of the campaign.

Q. 85. That is all.

7428

CROSS-EXAMINATION.

x Q. 1. (Mr. Hale) I believe you stated that Mr. Swift, whom you had known of in connection with premium schemes, brought you this dictionary proposition. Is that correct? A. No, he didn't bring the dictionary proposition.

7429

John W. Nolan—Cross.

MR. CARROLL: I object to the question.

x Q. 2. Who did? A. Mr. Skeoch.

x Q. 3. Who is Mr. Skeoch? A. One of the road men for the Syndicate Publishing Company.

7430

x Q. 4. How did he introduce this dictionary scheme to your attention? A. Before we took it on we had received some literature through the mail, telling of the success of the proposition with other papers, and previous to Mr. Skeoch's coming, one other representative of the Syndicate Publishing Company stopped over on his way from the West and he gave us a number of instances where the dictionary was pronounced a success.

x Q. 5. Who was that?

7431

MR. CARROLL: I object to all this line of testimony as improper cross-examination, none of the matter herein contained having been touched upon in direct examination, and protest that the Counsel for Complainant is making this witness his own witness.

A. I don't remember his name.

x Q. 6. Any one call upon you in connection with this scheme before you took it up and arranged it? A. I believe not.

7432

x Q. 7. When was the scheme first brought to your attention? A. To the best of my knowledge it was along in June or July of 1911.

x Q. 8. Who represented the "Springfield Union" in negotiations? A. I did, and also took the matter up with Mr. Plummer, who at that time was manager, is now publisher.

x Q. 9. What part did you have and what part did Mr. Plummer have in these negotiations? A.

John W. Nolan—Cross.

7433

I was in favor of taking it on after hearing of the success of the proposition on the other papers that had been mentioned to us, and we finally took it on.

x Q. 10. What was Mr. Plummer's position at that time? A. You mean relative to taking it on?

x Q. 11. Yes. A. Non-committal.

x Q. 12. Did you accept the proposition on the original terms offered?

7434

MR. CARROLL: Objected to as incompetent, irrelevant and immaterial.

A. Partly.

x Q. 13. What was the variation? A. Well on any scheme, any circulation scheme, it may be a good thing in one section of the country, get good results, and not be able to get the same results in another section. In my experience on some things, that has occurred. From time to time men have told me they have had big results on a certain proposition, for instance in the middle West, come on here, try it out exactly along the same lines and results did not measure up anywhere near to what they claimed had been in their section.

7435

x Q. 14. And all these considerations resulted in what modifications of the proposition as originally brought to you? A. Nothing.

x Q. 15. You said there was a variation? A. Well I simply gave my explanation, I told you the considerations that I considered partly. Perhaps I might have qualified that by simply giving you these reasons. That was the only hesitancy on our part in taking on the proposition. We had heard it went in one or two other sections but

7436

John W. Nolan—Cross.

7437

there was a question in our mind whether it was going to go in this section. Also because I had tried out a dictionary proposition in the city here previously, as I testified to a little while ago, and the results from the circulation standpoint was practically nil. Three or four dictionaries a day might be good from the publisher's standpoint but it would not be good for us from the circulation standpoint and in all these things I try to keep the circulation of the "Union" in mind.

7438

x Q. 16. How did you provide for that in the arrangement which you made with the Syndicate Publishing Company? A. We simply arranged to take the books on sale and return whatever we did not use.

7439

x Q. 17. Was that a feature of the proposition as first brought to you? A. Yes, in fact the only way we will consider any proposition that is offered to us is that.

x Q. 18. In other words you handle the books practically on consignment? A. Practically yes.

x Q. 19. Did the proposition involve any paid advertising in the "Union" to be paid for by the Syndicate Publishing Company? A. Now for that part of it, that was—the contract was signed up by Mr. Plummer and he will have to answer that question.

7440

x Q. 20. Contract signed by whom? A. Mr. Plummer.

x Q. 21. Is Mr. Plummer in the city? A. I believe so.

x Q. 22. Have you seen him today? A. He was this noon.

x Q. 23. Have you ever seen that contract? A. I have looked it over hastily. I looked it over from the view point of circulation, on having the books taken back, the return privilege.

John W. Nolan—Cross.

7441

x Q. 24. When did you last look at that contract? A. Should say about the time—just before it was signed up, I believe, I don't remember looking at it since.

x Q. 25. Defendant is called upon to produce the contract referred to for use in cross-examination.

MR. CARROLL: I refuse to, as no subpoena *duces tecum* has been issued, and further on the ground that it is incompetent, irrelevant and immaterial and that the whole line of this testimony is improper cross-examination. 7442

MR. HALE: Complainant responds he had no notice of the name of the man who would be produced and that complainant could not subpoena examined witness during the defendant's time for taking testimony. 7443

x Q. 26. Was there a provision in that contract for a certain amount of advertising in the "Union" to be paid for by the Syndicate Publishing Company? A. I would have to refer to the contract to be sure of that part.

x Q. 27. What is your best recollection, opinion and belief? A. That they were to furnish a part of the copy for us and to advertise it for us in good shape, to feature it. 7444

x Q. 28. Did they carry out that agreement on their part? A. I think so.

x Q. 29. Did that contract provide for anything which the Springfield Union should do in the way of advertising for which the Syndicate Publishing Company were not to pay directly?

7445

John W. Nolan—Cross.

MR. CARROLL: I object to that question on the ground that this witness has not testified that the Syndicate Publishing Company should pay directly for any advertising, in fact distinctly stated it was not to. He simply said they were to supply a part of the copy.

7446

MR. HALE: Statements of the counsel objected to as not in accordance with the testimony of the witness.

A. I will have to explain that in my way. We, of course, reserved the right to take any copy that came into the office and make it according to the policy of the proposition. If there was anything in the copy that came in, of course, we reserved that right to make any change we saw fit.

7447

x Q. 30. Now will you please answer the question as asked. (To stenographer) Please read question. (Question read) A. There was nothing in the contract I think specifying that particular point, not to my recollection.

x Q. 31. Did the Syndicate Publishing Company pay the "Springfield Union" for all the advertising matter that appeared in this dictionary campaign? A. That was all charged up to them, every inch of advertising.

7448

x Q. 32. How was that charge balanced or settled? A. When we made the settlement we deducted the amount of the advertising from the remittance.

x Q. 32. At what rates were these deductions made? A. At the rate per inch.

x Q. 33. How much per inch? A. I cannot say now, would have to refer to the books.

x Q. 33. Not the usual rate per inch to which you formerly testified? A. Our regular space rate, as you know probably, in newspaper advertising is a standard rate. The standard rate is based, as you might say, upon small amounts of advertising at 90 cents an inch. Special rate if you use a certain amount of space in a specified time; you get a better rate if you use a thousand inches in a month or five thousand inches in a month than if you used a hundred inches in a month. 7450

x Q. 34. What rates did you give the Syndicate Publishing Company for this campaign? A. I would have to refer to the books to find it out.

x Q. 35. What is your best knowledge, information and belief? A. I don't remember.

x Q. 36. No recollection whatever on that subject? A. No.

x Q. 37. You recollect it was considerably less than 90 cents an inch for the display advertising? A. I don't remember. 7451

x Q. 38. What is your best belief on that subject? A. I wouldn't want to say.

x Q. 39. Do you believe you charged them for it at the rate of 90 cents per inch? A. No, not on the space advertising.

x Q. 40. You know you did not, don't you? A. Yes, quite sure.

x Q. 41. Did you charge them half that? A. Probably more. 7452

x Q. 42. How much more? A. I can't say.

x Q. 43. Are you sure it was more? A. I think so. You must remember I looked after the circulation, not the advertising. I pushed this dictionary from the circulation standpoint, not from the advertising standpoint.

x Q. 44. Did the Syndicate Publishing Com-

7453

John W. Nolan—Cross.

pany pay 40 cents per line for the reading notices?

A. Why, I believe that was charged up with the other.

x Q. 45. At one rate? A. At one rate, I believe so.

x Q. 46. Did the Syndicate Publishing Company guarantee any specified amount of advertising it would use? A. I cannot say as to that.

7454

x Q. 46. What is your best belief? A. I think they assured us that it would be as in the contract, whatever was referred to in the contract to be used.

x Q. 48. They assured you the advertising would amount to a certain number of dollars?

A. Why, in their talk with me. Of course talk and a contract are two different matters.

x Q. 48. You offered the dictionary at three different prices, did you not? A. Yes.

7455

x Q. 49. And 48 cents was the lowest? A. Yes.

x Q. 50. Do you mean to say the amount received at the prices stated was enough to cancel the charge for all the advertising at the rate agreed upon? A. I do.

x Q. 51. And leave a profit to the "Springfield Union"? A. I cannot say as to the profit.

x Q. 52. You have testified there was a profit. A. When did I testify that?

7456

x Q. 53. You said the profit which should remain after the price agreed for the advertising was deducted to be divided between the Springfield Union and the Syndicate Publishing Company. A. I don't remember.

x Q. 54. Were the dictionaries billed by the Syndicate Publishing at a price less than the price offered in your advertisements, to wit, 98 cents, 81 cents and 48 cents respectively? A. You mean

John W. Nolan—Cross.

7457

were they billed to the Springfield Union by the Syndicate Publishing Company?

x Q. 55. Yes. A. They were.

x Q. 56. At what price were the books billed to the Springfield Union. A. 48c was the lowest price; those cost us——

MR. CARROLL: I object to that question and direct that the witness does not answer it.

7458

MR. HALE: The direction of the counsel is objected to as an improper interference with cross examination and the Examiner is requested to certify to the Court the propriety of the question and judge if the witness should not answer.

x Q. 57. Will you please answer the last question now?

MR. CARROLL: He is directed not to.

7459

A. I do not care to answer.

x Q. 58. After the Syndicate Publishing Company was charged with the amount of advertising used in this campaign and was credited with the price of the books agreed upon to be paid to the Syndicate Publishing Company, which was something less than the price at which they were offered to the public by the Springfield Union, was there still a surplus left? A. As I said before I cannot say to that.

7460

x Q. 59. This dictionary premium offered by your paper was not one of the instances, to which you testified on direct examination, where the public got the goods for less than they cost the paper, was it? A. After charging up the advertising and all other expenses, express charges,

7461

John W. Nolan—Cross.

freight charges, cost of handling, all that, I don't know but they were, clerk hire, also cost of mailing.

x Q. 60. And these items came out of receipts from what your advertisers term the "expense bonus" did they not? A. They were supposed to.

7462

x Q. 61. As a matter of fact, they did, did they not? A. No, not all. The extra clerk hire we didn't charge in direct against the account, we charged that up to one of our other items.

x Q. 62. How many extra clerks did you employ for this purpose? A. From one to three, depending upon the amount of business, demand from the counter and also the amount of help required to mail them.

7463

x Q. 63. Have you any information as to whether or not when the whole campaign was closed, a balance was due from the Springfield Union to the Syndicate Publishing Company on account of receipts from the sales of dictionaries? A. I don't remember.

x Q. 64. What is your best recollection, opinion and belief? A. I don't remember as to that.

x Q. 65. Have you no belief whatever upon that subject? A. As I told you, I had been working from the circulation standpoint. After it was over, I didn't concern myself with that part of it.

7464

x Q. 66. I am entitled to obtain your belief on this subject. Will you please state what it is? A. I can't very well answer your question when I don't remember.

x Q. 67. You have no belief whatever on the subject then? A. If a man doesn't remember, is that a sign he has no belief?

x Q. 68. The question was, what do you believe as to whether or not there was a balance due to the

Syndicate Publishing Company on account of this dictionary campaign.

MR. CARROLL: Objected to as incompetent, irrelevant and immaterial, on the ground that his belief when the party has testified he remembers nothing about it is obviously incompetent.

A. I think they broke nearly even.

x Q. 67. This dictionary scheme, as handled by your paper, didn't contain the requirements that persons desirous of obtaining a dictionary should subscribe to your paper for any specified length of time, did it? A. No.

7466

x Q. 68. All they had to do was to present six coupons? A. That was all.

x Q. 69. At what price does your paper sell? A. 2c. per copy for the daily paper and 5c. for the Sunday paper.

x Q. 70. Did you always require six coupons? A. We did until the wind up, about the last week I think.

7467

x Q. 71. What was the circulation of the Springfield Union prior to the first advertisement in the dictionary campaign? A. That is starting in August, about 23,000 or 24,000, about 24,000, I should say to the best of my knowledge.

x Q. 62. And the circulation of the paper had been growing in recent months? A. Been growing since then?

7468

x Q. 63. Had it been growing at that time in recent months? A. Yes.

x Q. 64. At what rate approximately? A. At the rate of possibly four or five hundred a month, on the average.

x Q. 65. The Springfield put its reputation and

John W. Nelson—Cross.

7469

standard back of this dictionary proposition, did it not? A. In a way, yes. We thought the book had some merits, and was well put up.

x Q. 66. And you have testified that the public attitude toward newspaper premium schemes is that the standing and reputation of the paper is an assurance of the quality of the goods, and their value. Is that correct? A. As to their value?

x Q. 77. Yes. A. Yes.

7470

x Q. 78. That the goods are worth the value asked by the paper? A. Yes.

x Q. 79. So they really depend upon the character and standing of the paper as an assurance of the genuineness of the goods? A. As a rule, yes.

x Q. 79. Do you think they did so in the dictionary campaign? A. What do you mean by that question, be more explicit.

7471

x Q. 80. Just what I meant on the previous questions which you found no difficulty in answering. A. As to the genuineness, genuineness of what?

x Q. 81. Can you answer the question?

W. C. CANNON: He asked you to explain it.

A. Not until you explain it.

x Q. 82. The witness found no trouble whatever in answering the previous questions until the word "dictionary" was mentioned and I see no reason for difficulty on that.

7472

W. C. CANNON: The witness has asked to have it explained, stating he does not understand it.

A. Will you ask that question once more.

x Q. 83. (To stenographer) Will you please

and that question? (Question read). A. That only upon the fact that we were offering them a dictionary that was worth more than \$6. For we suppose plus \$6. for a long leather edition.

Q. 41. Offering what kind of a dictionary? A. A dictionary as advertised in the Union as "Webster's Dictionary",—as advertised in the "Union" at that time.

Q. 42. What was said to you by the representative of the Syndicate Publishing Company when he first brought this proposition to you? A. He simply talked to us. He talked simply about the dictionary and the circulation proposition.

Q. 43. Didn't say anything about the popularity of the Webster Dictionary? A. He simply stated the assurance that it had an other person.

Q. 44. He did then say something to the effect that Webster Dictionary was popular? A. He said that his particular proposition as offering in connection with these autographs was a success and was very popular.

Q. 45. Did he mention the name of the dictionary in that connection? A. He showed the dictionary; the title was there, "Webster Dictionary", gotten out by the Syndicate Publishing Company.

Q. 46. Did he at any time during these negotiations say that Webster's Dictionary was popular with the public? A. He didn't specify "Webster's" at any time.

Q. 47. Never said the name? A. Not to my knowledge. We simply talked in a general way of dictionaries. Everybody wanted a dictionary as well as a Bible, also one of those connected accessories should have a set of Shakespeare and have a complete literary education.

x Q. 91. Did he ever say anything in substance or to the effect that Webster's Dictionaries were very well known? A. Not to my knowledge.

x Q. 92. Have you here present any of the first literature which you say you received in connection with this proposition? A. You mean here?

x Q. 93. Yes. A. What are the dates of some of those advertisements?

x Q. 94. I mean the literature you received when the proposition was first brought to your attention? A. No, I don't know as I have anything of that sort now.

x Q. 95. You saw the book represented in that literature? A. It was represented as a dictionary, as being a pronounced circulation winner for any paper that would agree to take it up.

x Q. 96. Did it go into the merits of the book? A. No, it went into the merits of the scheme, the coupon scheme.

x Q. 97. Who prepared the advertisements which appeared in the Springfield Union on this dictionary? A. The Syndicate Publishing Company prepared most of them. That is an arrangement we like to make with any concern where we are pushing their proposition, whether it is books or merchandise, and they have experts in their line, where they can play up these things better than we can, have more time.

x Q. 98. You allowed them the use of the name of your paper for that purpose? A. We advertised the dictionary, the Union was first, the dictionary afterwards.

x Q. 99. What was the character of the changes, if any, which the Union made in the advertising matter furnished by the Syndicate Publishing Company? A. Well, I can't say offhand. We reserv-

ed the right, if there was anything that we cared to change we wanted the privilege, in fact we used it. There may have been something in some of the copy that may not have fitted local conditions.

x Q. 100. Do you recall any specific changes which you made in any of these advertisements?

A. No, nothing now.

x Q. 101. None of them were very material? A. No.

x Q. 102. When this proposition was first brought to you, was that the first time you had ever heard of a "Webster's" dictionary? A. Why, yes, we had used the dictionary before, a Webster's Dictionary before on the canvas, and it was a failure.

7482

x Q. 103. That was the book which you said was published by Werner or Saalfeld, Werner's successor? A. Yes, they had a Webster's Dictionary.

7483

x Q. 104. Was that book taken from the 1847 Webster Edition? A. It was an old edition, don't remember what year.

x Q. 105. You say it was poorly printed and bound? A. Just fair, supposed to be a sheep-skin binding, if I remember rightly.

x Q. 106. Was it as a matter of fact? A. Supposed to be, I didn't notice that part to find out whether it was or not, I am not an expert.

x Q. 107. Paper also was poor, was it not? A. Just fair.

7484

x Q. 108. Do you remember that book was on sale at the department stores for about a dollar at that period? A. I know the book was offered, I can't say whether it was before or after we used it.

x Q. 109. About that time it was offered? A.

John W. Nolan—Cross.

7485

I can't say what price either. I am not certain just what price we charged on the canvas at that time. At that time, I know what we used had no connection with the canvas, it was to be used on the instalment plan and where a premium is used on the instalment plan it is, of course, supposed to be fairly popular.

7486

x Q. 110. When this Syndicate Company's dictionary was brought to you did not it occur to you that there was any danger of confusion in the public's mind as to the identity and origin of that book? A. No.

x Q. 111. You knew at that time that the Merriam Company in this city had been publishing Webster's Dictionaries for a great many years, did you not? A. I knew that, and also knew that other concerns published Webster's dictionaries, such as the Ogilvie Company.

7487

x Q. 112. Never mind what else you knew, you knew that, didn't you? A. I did.

MR. HALE: The witness's answer after the words "I knew that" is objected to as not responsive and the motion is made to strike it out.

x Q. 113. Have you any objection to confining your answer to the question asked? A. Not if I can fully explain the question in the answer.

7488

x Q. 114. It did not occur to you then that there was any possibility of a book advertised under the name of "Webster's" Dictionary being assumed by the public to be the Webster's dictionary long published by the Merriam Company? A. If there had been any such assumption on the part of the public we would have heard of it.

John W. Nolan—Cross.

7489

MR. HALE: The answer is objected to as not responsive and motion is made to strike it out.

x Q. 115. The question is, did that possibility occur to you, when this proposition was brought to you, that admits of an answer "Yes" or "No." A. No, that possibility did not occur to me.

x Q. 116. All the other circulation schemes which you commented upon in your direct examination involved a subscription for the paper for a stated period, did they not, and I call your attention to the "Dot" campaign, the "pony" and "flag" schemes and the "phonograph" scheme? A. All of the foregoing mentioned schemes called for subscriptions for a stated period.

7490

x Q. 117. Did you ever indulge in a premium circulation campaign before this dictionary scheme in which the maker or manufacturer of the premium guaranteed the paper against loss? A. I didn't catch just your meaning. What loss? There are two ways of looking at guaranteeing us against loss, in what way, on the carrying of the premium?

7491

x Q. 118. In any way. A. Well, wherever we can on any deal we enter into, we of course seek to protect ourselves just as fully as possible.

x Q. 119. I am asking you, have you entered into any deal where the concern that furnished premiums to the paper guaranteed the paper against loss?

7492

MR. CARROLL: The witness has indicated that he doesn't fully understand the question. Explain it and he will probably give you an intelligent answer.

7493

John W. Nolan—Cross.

MR. HALE: The question needs no explanation.

MR. CARROLL: Probably not to you who framed it.

A. I have answered it as fully as I can that way.

x Q. 120. You recall any such instances? A. Not just now.

7494

x Q. 121. You recall any scheme in which the supplier of the premium guaranteed the paper a definite amount of advertising receipts for advertising in connection with the circulation campaign before this dictionary campaign? A. I don't remember now.

x Q. 122. None of the schemes you have mentioned did that? A. The most of the schemes I have mentioned are on a canvas, canvassing proposition instead of coupon proposition.

7495

x Q. 123. And the paper took its own chances on them as to the result? A. As to the results, any we ran, we had the return privilege on all propositions, we were protected in that way.

x Q. 124. You were not paid for your advertising? A. We didn't advertise in all of those instances; in some of the instances we did.

7496

x Q. 125. You were never paid for that by the supplier of the premium except in this dictionary instance? A. In some of these propositions the sales of the premiums in a way paid for most of the advertisement.

x Q. 126. And the paper assumed the risk of the sales being sufficient to pay for that? A. Yes, we took the chance, the same as we have to take a chance on any proposition we use.

x Q. 126. Who was the outside man from whom you obtained the "Dot" and "Pony" schemes?

A. I don't remember his name now, that was a number of years ago.

x Q. 128. It was not then the same man Swift who supplied those premiums? A. I was going to remark further in regard to the guarantee against loss and on taking a chance on things. Of course, you know in the circulation game that some of the premiums you use on a canvass, instead of using them by advertising in the paper, and you can possibly incur a loss on canvassing expenses and one thing and another and that way you are taking a chance either way.

7498

x Q. 129. What was the total number of dictionaries disposed of in this campaign? A. Twelve thousand and something.

x Q. 130. In a period of how many weeks? A. From August 18th, up to the close, which was November 11th.

x Q. 131. During that period were daily advertisements carried in the paper? A. Nearly every day.

7499

x Q. 132. Who supplied the copy for the reading notices which appeared? A. Most of it was furnished by the Syndicate Publishing Company and I believe in some cases revamped by the Union.

x Q. 133. Prior to the advertisement in the issue of October 21st, 1911, did your advertisements contain a statement in form as follows: "This dictionary has been revised and brought up to the present date in accordance with the best authorities and is not published by the original publishers of Webster's Dictionary, or by their successors, but by the well-known Syndicate Publishing Company of New York"? A. I will have to refer to these files there.

7500

John W. Nolan—Cross.

7501

Witness refers to files.

A. I think not.

x Q. 134 In other words, the issue of October 21st was the first issue to contain that notice in any form? A. Yes.

7502 x Q. 135 In this advertisement of October 21, 1911, appears the statement, "Some months ago the Union decided to present to its readers an opportunity of securing for themselves a MODERN dictionary, along the lines of the great and successful plan in operation with 200 or more of the largest Metropolitan papers in the United States." The decision there referred to means the acceptance by the Springfield Union of the proposition brought to it by the Syndicate Publishing Company? Is that correct? A. Yes, upon their assurance that it had been a success on other papers, we took it up.

7503 x Q. 136 Who furnished the copy for this advertisement of October 21, 1911? A. Most of the facts were furnished by the Syndicate Publishing Company.

x Q. 137 Was not the entire copy for that furnished by the Syndicate Publishing Company? A. I cannot say as to that.

x Q. 138 What is your best belief on that subject? A. I think most of it was.

7504 x Q. 139 Was any part of the advertisement except that contained in the box at the foot, which contains the offer to refund the money to dissatisfied purchasers, if there were any such, prepared by the Springfield Union or any of its representatives? A. I cannot say.

x Q. 140 What is your best belief? A. I think not.

1877

John W. Nolan—Cross.

7505

x Q. 141. If I should show you a precisely identical advertisement clipped from a Western newspaper, using the same words and the same form of display would that refresh your recollection as to whether or not the copy was furnished by the Syndicate Publishing Company or prepared by the Springfield Union?

MR. CARROLL: I object to that question unless the paper specified is produced.

7506

MR. HALE: I produce and show you an advertisement clipped from the "Peoria Star" of Peoria, Illinois, dated November 15, 1911.

x Q. 142. Upon inspection of both these advertisements I ask you who prepared it the Springfield Union or representatives of the Syndicate Publishing Company.

7507

MR. CARROLL: I object to this question on the ground that the last mentioned advertisement is dated November 15th, at least three weeks after the advertisement appeared in the Springfield paper, and therefore cannot refresh the recollection of this witness as to the origin of the earlier advertisement.

x Q. 143. Let the witness answer the question please. A. As I told you before I think the Syndicate Company furnished most of the facts.

7508

x Q. 144. And the language also? A. The facts and the language likewise.

x Q. 145. At the time this Syndicate Company proposition was brought to you did any one bring to you a proposition to use Webster's Condensed

7509

John W. Nolan—Cross.

Dictionary in the same manner? A. A representative with Webster's Condensed of Merriam's Edition?

x Q. 146. Yes. A. There was a representative from Reilly & Britton of Chicago who stopped off in Springfield along about that time who said he had a Webster's Dictionary and wanted to have us take it up.

7510

x Q. 147. Did you consider his proposition? A. No, because he stopped over here just about the time that we were starting in on this, if I remember rightly.

x Q. 148. Had you already closed with the Syndicate Proposition? A. We had or were about to—.

x Q. 149. You had made up your mind on the proposition? A. We had made up our mind to use the Syndicate Company's books.

7511

x Q. 150. Do you remember the precise date? A. No, I do not.

x Q. 151. This advertisement of October 21, 1911 says that you adopted the Syndicate Company's Webster's New Standard Dictionary among other reasons because it was based on the unabridged dictionary of Noah Webster, L.L.D. but was revised and brought up to date in accordance with the most recent eminent English and American authorities. Did you know that statement to be true at the time you published this advertisement? A. We supposed it to be true.

7512

x Q. 152. What were the grounds of that supposition or belief? A. The fact that it was being brought up to date and all editions of dictionaries are based upon the original Webster's are they not?

x Q. 153. All dictionaries? A. Yes, practically all the English dictionaries are based upon original Webster's.

x Q. 154. Was that idea the basis of this statement in this advertisement? A. Mostly so.

x Q. 155. Did you know whether or not that statement was true or false when you published it? A. We considered it true.

x Q. 156. And upon what facts did you act, facts or representations did you act in publishing that statement? A. Upon the facts furnished to us by the Syndicate Company. 7414

x Q. 157. And you did not pursue the inquiry further? A. Why no. We already knew that Ogilvie had been publishing a large edition after some litigation with the original publishers of the Webster's.

x Q. 158. Then it did occur to you at that time that there might be some question over the use of the word "Webster's" when it was not published by the Merriams? A. No. 7515

x Q. 159. What did you mean by your last answer? A. I simply meant that Ogilvie received permission to publish his dictionary on a copyright, or whatever it might have been, on the original Webster, that had long before expired, in fact had decayed.

x Q. 160. You knew that at that time and acted upon that belief did you? A. We acted upon that belief. 7516

x Q. 161. In this same advertisement you referred to the fact that another dictionary of similar form, even copying a portion of the features of that book, as stated by the advertisement, was on sale at stores in Springfield for 90 cents? A. Yes.

7517

John W. Nolan—Cross.

x Q. 162. To what book does that language refer? A. To another limp leather edition on sale here in the stores.

x Q. 163. Published by whom? A. I believe Cupples & Leon.

7518

x Q. 164. And you remember, do you, the title that book was "Webster's New Century Dictionary"? A. I remember that it was "Webster's" dictionary with some qualification.

x Q. 164. And you remember, do you, the title had the words "Webster's Dictionary"? A. With some variation of title.

x Q. 165. You don't remember that any referred to the Webster's Condensed Dictionary of the Merriam Company? A. No, I don't think that was on sale in this city.

7519

x Q. 166. You also stated in the same connection with this 90c. dictionary that 90c. is "all and more than it is worth." What did you know on that subject? A. The copy that I saw the binding seem to be a little poorer than what we offered.

x Q. 167. Was that all you meant by that statement? A. Mostly, its general appearance.

x Q. 168. How about the literary contents? A. I didn't look through the book, we were pushing our books, not theirs.

7520

x Q. 169. This same paragraph referred to this same 90c. book of Cupples & Leon and stated "It has not had the same revision." What do you know about that? A. I cannot say anything on that.

x Q. 170. Did you not know that Cupples & Leon's was printed from a duplicate set of plates the same as the Syndicate Company used? A. I never took the trouble to look it up.

x Q. 171. What is your best knowledge, information, recollection and belief on that subject? A. I have no information on it. We were just pushing the Syndicate books.

x Q. 172. Have you any information upon that subject? A. Not personally, except what was furnished to us.

x Q. 173. You heard that book was printed from these same plates, have you not? A. Since then I have, but not at the time, when we were offering the Syndicate book. 7522

x Q. 174. At the time you took up this book did you know it was a book printed from the plates of an older dictionary formerly published under another name? A. At the time we took up what books?

x Q. 175. The Syndicate Company books. A. That it was formerly printed under another name? 7523

x Q. 176. Yes. A. No.

x Q. 177. Did the Syndicate representative tell you anything along that line? A. I don't remember that he did.

x Q. 178. Do you remember that they did not? A. I do remember that they emphasized the fact that the book had been brought up to date, that it was a popular size, good binding, printed on good paper about the right size type and on these features we pushed the book. 7524

x Q. 179. Did they tell you how it was brought up to date? A. I don't remember as they did.

x Q. 180. What did they say about the careful revision of it bringing it up to date? A. If I remember rightly, the substance of their talk was they had put in a good deal of time and money in bringing it up to date in every way.

x Q. 181. Did they tell you it had been brought up to date by blotting in a few words in place of some which had been moved off in order to get out of that? A. No.

x Q. 182. Did you know that fact? A. No.

x Q. 183. Did they tell you the book was printed from the plates of an older dictionary? A. No.

x Q. 184. Did they tell you books were furnished to the public from the same plates under the name of the *Crown Dictionary*? A. No.

x Q. 185. Did you know that fact? A. No.

Mr. Commons: I object to that question on the ground that it is admitted in the record that the plates of this book were first prepared in 1868 and the book was then published under the name of the *Crown Dictionary*; and it further appears from the record that since that date, 1868, that the book has received several revisions, and had plate changes which is the accepted method of revising dictionaries, when it is too expensive to prepare entire new plates.

Mr. Moore: The statement of counsel is objected to as attempting to convey knowledge to the witness under the guise of an objection and protest is made against that sort of thing.

x Q. 186. In this same advertisement referring to its being up to date after the words "revised" "Electronium" and several other words connected the advertisement and that "This dictionary contains thousands of such words of present common use." Did you know when you published this advertisement whether or not that

statement was true? A. We took it for granted that they were.

Q. 187. It states that these "thousands" of words were omitted from what is termed "The Omission" book, referring to Webster's Unabridged Dictionary. Do you have anything to say that was true? A. No, I never took the trouble to look it up.

Q. 188. Was there some to whom you sold before the advertisement? A. I took it from him who had previously bought it up.

Q. 189. This advertisement further states that the Springfield Union adopted this book because "it is up-to-the-minute" and further that "A book of reference should be portable and it must be modern." Did you have anything to say that description was true as applied to this Omission book? A. We took it for granted it was, upon their assurance.

Q. 190. The assurance of the Springfield Publishing Company? A. Very distinctly so.

Q. 191. Was made no further investigation of it? A. No, that's how they ran it.

Q. 192. The same advertisement also states that the book of the Springfield Publishing Company includes "Thousands of new words that have been added to our vocabulary within the last twenty years and more to the present year," what was the year 1911? Did you have anything to say that statement was true when you published it? A. We supposed it was.

Q. 193. Was the book of that description was the representation of the Springfield Publishing Company and no other investigation? A. No.

Q. 194. Is that same advertisement in the paragraph marked "D" you stated substantially

7533

John W. Nolan—Cross.

that the text matter of the "Condensed" book referring to Webster's Condensed was compiled 60 years ago, is that statement true? A. We simply took the statement of the Syndicate Publishing Company.

MR. CARROLL: I object to that as incorrectly stating the fact.

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MR. HALE: The paragraph itself shows the correctness of the question.

x Q. 195. You didn't know whether that statement was true or false then? A. No.

7535

x Q. 196. The same advertisement also says that the Springfield Union adopted and used this book, Paragraph "I" because no representations are made that are not borne out by fact; "educators, teachers, instructors, private and public institutions are loud in their praises of this modern dictionary." Was that statement made by the Springfield Union upon its own knowledge or is it an acceptance of matters sent to it by the Syndicate Publishing Company? A. We received hundreds of compliments upon the dictionary, and no complaints from any of the persons who bought the copies.

7536

x Q. 197. From what public institutions did you receive any such "loud praises?" A. I don't recall just now.

x Q. 198. Do you recall the fact that you did receive any from any public institution? A. We received so many that we didn't attempt to specify them by putting them in any particular class.

x Q. 199. Then you did make this statement upon its reliability upon information received from the Syndicate Publishing Company? A. Partly, yes.

x Q. 200. This same advertisement in the paragraph on the left, marked "L" states that the "Book distributed by the Union was based upon the unabridged dictionary of Noah Webster and no other." Is that statement true of your own knowledge? A. We accepted the statement of the Syndicate Publishing Company.

x Q. 201. And had no other information or evidence upon that subject? A. We thought that was sufficient.

7538

x Q. 202. Would you have accepted this book and published this advertisement if you had known that this book was a reprint from the same plate as the Crown Dictionary? A. If it had been brought up to date it may have had some bearing upon the matter.

x Q. 203. Would you have accepted this book in this manner and published this advertisement if you had known this book and the Crown Dictionary were both very largely compiled from the English—

7539

MR. CARROLL: I object to that, as that does not appear in the whole testimony, in fact the whole testimony is directly to the contrary.

A. We might have, if it had been thoroughly brought to date in every way.

x Q. 204. Did you know whether or not this book was founded upon an English book and not on Webster's Dictionary when you undertook this dictionary and published this advertisement?

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MR. CARROLL: Objected to as assuming a state of facts entirely opposite to the evidence.

John W. Nolan—Cross.

7541

A. We relied upon the integrity of the Syndicate Publishing Company.

x Q. 205. And the public relied upon the integrity of the Springfield Union? A. They did and we have yet to receive a complaint. Showing they are satisfied.

7542

x Q. 206. You were willing to put the integrity of the Springfield Union back of the statement which I have read you from this advertisement? A. We have yet to regret it.

x Q. 207. You were willing to do so with no further investigation? A. It was evidently justified, everybody seems satisfied.

MR. HALE: The answer is objected to as not responsive and motion is made to strike it out.

7543

x Q. 208. This whole advertisement is in the name of the Springfield Union and states specifically that the Springfield Union adopted the Syndicate Company's book in preference to Webster's Condensed Dictionary because of the facts enumerated, among other facts which are also enumerated. How do you justify that in view of your testimony that the Springfield Union made no investigation but relied upon the representations of the Syndicate Publishing Company? A. Because we considered the principals of the Syndicate Publishing Company men of integrity in every way.

7544

We didn't think for a minute that they would foist anything upon the public but what had an actual value, and as I said before of all the dictionaries we sold in this section we have yet to find any dissatisfied buyers. We still stand ready if there are any such persons to refund the money at any time.

x Q. 209. You didn't believe that the Syndicate Publishing Company would foist off upon the public an old dictionary known as the "Crown Dictionary" under the guise and name of a Webster's Dictionary, did you?

MR. CARROLL: Objected to as not stating the facts. A dictionary prepared eight years ago and frequently revised should not be called "old" in comparison with an edition of 1884 sold by the Merriams.

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x Q. 210. Please answer the question. A. We accepted the dictionary as it was offered to us and upon the assurance that they gave to us that it was brought up to date, and as it had good binding, was printed on good paper and of the right size and type to please the majority of the people.

x Q. 211. Then the Springfield Union was perfectly willing to lend its prestige to a scheme to deliver to the public the Crown Dictionary under the guise of a Webster's Dictionary?

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MR. CARROLL: I object to the form of that question on the ground that it has been testified that the Crown Dictionary which was prepared only eight years ago was based on Webster.

A. We did not recognize the Crown Dictionary in the matter one way or the other. We simply recognized the book of the Syndicate Publishing Company as shown to us.

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x Q. 212. And you supposed it was what it purported to be, is that correct? A. We did.

x Q. 213. In other words you supposed it was a Webster's Dictionary? A. We supposed it was

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John W. Nolan—Cross.

one edition of Webster's Dictionary brought up to date.

x Q. 214. Then if you had known that the book was a reprint of an old English Dictionary—

MR. CARROLL: I must object to any such question as that is not a fact and counsel knows he has no proof of any such things.

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x Q. 215. Then if you had known at the time that the Syndicate Company's book was a reprint of an English Dictionary and contained English forms of spelling and English forms of definitions would you have been willing to accept it as a Webster's Dictionary; and would you have been willing to publish and stand behind this advertisement of October 21st? A. It seems to me as for the definitions, etc., between the American and the English there must be very little difference and if there is any material difference, the fact of their being brought up to date any such cases occurring would be changed accordingly.

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x Q. 216. I am asking you if you had known that this book was based upon and in fact was practically a reprint of an English Dictionary, instead of believing that it was based on the unabridged dictionary of Noah Webster, would you have been willing to lend the prestige of the Springfield Union for the exploitation of it as Webster's Dictionary? A. I think I answered that question before.

7552

x Q. 217. Answer it once more, please. A. By stating that if it was brought up to date all those changes necessary would have been made, and furthermore as I stated before, the proof of it is that the public seems satisfied as we have yet to find any dissatisfied buyers.

x Q. 218. If I understand you correctly, if any person to-day should take an old English dictionary and bring it up to date, as you stated, the Springfield Union would be willing to advertise and sell that book as a Webster's Dictionary, is that correct?

MR. CARROLL: Objected to as not what witness stated.

A. We have already sold the dictionaries and covered the field, and we do not believe it could be covered twice. The average families want only one dictionary or could afford only one dictionary for the present generation.

7554

x Q. 219. You see no objection, either in law or morals to calling a dictionary "Webster's Dictionary" which is based upon and in fact is a reprint of an English Dictionary, is that correct?

MR. CARROLL: Objected to as irrelevant and immaterial.

7555

A. If the definitions are correct and it is brought up to date in every way.

x Q. 220. No matter who wrote it in England you are willing to call it an English Dictionary in this country? A. I won't go as far as that.

x Q. 221. I am trying to get at your idea of commercial morality. If you knew that this dictionary was based upon an English Dictionary, and that that statement which appears in your advertisement that it was based upon an unabridged Dictionary of Noah Webster was false, would you have been willing to have exploited it and advertised it as a Webster's Dictionary and used the prestige of the Springfield Union to circulate it in that name?

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John W. Nolan—Cross.

MR. CARROLL: I object as irrelevant and immaterial and on the further ground that the statements are to the knowledge of counsel for complainant false.

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A. Well, that is a pretty wide field you are trying to cover on the question, I think. I think I have made our position clear when I stated several times previously that the dictionary was represented to us as being brought up to date in every way, and any changes that may have occurred, any differences in the intervening years were made in the dictionary that we put on, and the best proof as I have stated before is the fact that the persons who bought the dictionary seem to be perfectly satisfied, and it is now nearly one year since the first dictionary was sold and we think that in all that time that in this community, that if the dictionary was not what it was represented to be we would have heard of it long and loud, before this.

7559

x Q. 222. Don't you know you haven't answered the question? What is your objection to being fair? A. I think I have covered your question in my answer in every possible way in fairness to you.

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x Q. 223. (To stenographer) Will you please read the question? Question read. A. I still am of the same opinion. I don't believe I can cover your question any more thoroughly than I have done.

x Q. 224. If the English dictionary assumed in the last question was a good dictionary and had been properly brought up to date, if I understand your answer correctly, you would be perfectly willing to sell it in this country as Webster's dictionary, although as a matter of fact it was not

based upon the unabridged dictionary of Noah Webster or any other Webster's dictionary? Is that correct? A. Yes, I think if the definitions contained in that dictionary you speak of were correct and up to date in every way and words of recent coinage etc. were to be found in a dictionary of that kind, that it would meet with a ready sale and the public would be satisfied, no matter whether it was sold under the name of Webster or if it was sold under some other name.

7562

x Q. 226. You think then that if one commercial house deals in goods widely known under a certain name, it is commercially honest to adopt that name for other goods if those other goods are of equal intrinsic merit.

MR. CARROLL: I object to that question as assuming one of the most important points at issue in this case, whether or not the goods of the complainant's are known as Webster's Dictionaries and whether or not other dictionaries are not known as Webster's.

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MR. HALE: This coaching form of objection is again objected to.

MR. CARROLL: It is no coaching as counsel for complainant knows. It is simply an attempt to correct misstatements of counsel for complainant. It is objected to further as irrelevant and immaterial.

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A. In this particular case.

x Q. 227. Please answer the question as asked, never mind "particular cases." A. I can only answer the question in my own way and as long as the dictionary is the subject of discussion I think we will have to refer to it as this particular

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John W. Nolan—Cross.

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case. As I was going to say, in this particular case, it is of course a well known fact that there are more than one publication of dictionaries under the name of "Webster," as I to my present knowledge know that Mr. Ogilvie has got a very large dictionary on the market which he sells as a "Webster's" and which some years ago he wanted to have us consider in connection with the Union as a premium. And I think the name of Webster in this present day does not have the significance that it had years ago.

MR. HALE: The effect of counsel's coaching is plainly apparent in the answer.

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WITNESS: The statement of the counsel for defendant has absolutely no bearing upon what I have had to say, as my answers are based entirely upon results obtained by us when using the dictionary.

x Q. 228. Is it your view then that the name "Webster's Dictionary" may be properly and honestly used upon any dictionary whatever without regard to whether it has any connection with the dictionaries of Noah Webster?

MR. CARROLL: Objected to as irrelevant and immaterial.

7568

A. It all depends, of course, in a way upon the size of the book, I suppose that even a pocket edition can be called Webster's Dictionary, and a person can go into any book store and for 10c, 15c or 25c can buy one, and if it is a person of any intelligence they know they are not going to get a Webster's Unabridged, and the same would apply to a dictionary that sold the same as we used a year ago for 98c.

x Q. 229. In this same advertisement of October 21, I find the statement "The fact remains that the book distributed by the Union was founded on Webster's Dictionary." Did you rely upon the Syndicate Company's statement as to the assurance of the truth of that statement? A. Yes.

x Q. 230. You did not make any personal investigation? A. No, didn't have time.

x Q. 231. If that statement were shown to be false and you had known that it was false at the time this advertisement was published and at the time you took up this campaign, would you have been willing to have gone forward with the campaign and have published this advertisement and to have circulated this book as a Webster's Dictionary? A. We might have gone forward and circulated it as a Webster's Dictionary, such being the title of it, but I hardly think we would have advertised it as being based upon Noah Webster's if we knew that such was not the case.

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x Q. 282. In this same advertisement I find a statement that the assertion of the Merriam Company that this book distributed by the Union "was not founded on the work of Noah Webster was found on investigation to be untrue." Did the Springfield Union make any investigation of that subject? A. No.

x Q. 283. Yet the Springfield Union expected the purchaser of its dictionaries to rely upon that statement, did they not? A. Yes, because we considered the Syndicate Company people honest.

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x Q. 284. Then you are willing to stand and fall on the Syndicate Publishing Company in this matter, is that correct? A. Based upon the success of the book we think we were justified in

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John W. Nolan—Cross.

accepting most of their statements, as we have yet to find any dissatisfied buyer of the dictionary.

x Q. 285. Did any of the purchasers, by letter or otherwise, refer to their long acquaintance with Webster's Dictionary? A. No, they simply took advantage of the offer, we supposed on account of the bargain price and also the fact that a number of them had seen the dictionary in the homes of their relatives and friends.

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x Q. 286. Were these commendatory letters called forth by requests therefor? A. They were voluntary.

x Q. 287. Did you not include a circular suggesting topics of comment in case they felt disposed to write? A. Yes, we did. I believe it is customary in most publications, especially when they are offered by newspapers.

7575

x Q. 288. And that literature was supplied to the Union by the Syndicate Publishing Company? A. Those circulars.

x Q. 289. Yes. A. Yes.

x Q. 290. Speaking of advertising customs, is the using of reading notices in connection with displayed advertisements usual on the part of a paper in advertising campaigns? A. It is with newspapers where they have some particular proposition they wish to push.

7576

x Q. 291. And how long has that custom been in operation? A. Ever since there have been any live men on newspapers.

x Q. 292. Which would be a good many years would it not? A. Yes, that is one scheme that newspapers usually reserve to themselves, if they have anything of the sort they wish to push, in connection with a displayed advertisement they will also use readers.

x Q. 293. In such advertising campaigns, you have spoken of the necessity of using a psychological price or a bargain price. I suppose it is equally necessary to convince the customer that the goods are a bargain at the price, is it not? A. Yes.

x Q. 294. And that they are not what might be termed in a slighting sense "bargain quality"? A. Yes it is so understood, and it is evident in the sale of the dictionary that the buyers are of the opinion that they got a bargain.

7578

x Q. 295. Did any of the dictionaries distributed by the Union contain the warning notice contained in the later advertising matter beginning "This dictionary has been revised," etc.? A. I believe they did, the later shipments.

x Q. 296. The earlier ones did not, however? A. No, it stated on the title page they were published by the Syndicate Publishing Company of New York.

7579

x Q. 297. You mean the name was in the ordinary publishers' imprint in the ordinary form? A. Yes, and if I remember rightly it seems as though the name was stamped on the back of some of the dictionaries, the early dictionaries that we sold.

x Q. 298. You mean the Syndicate Publishing Company? A. Yes.

x Q. 299. At the bottom of the book? A. Yes.

x Q. 300. Will you please produce and allow me to select from your collection some other specimen copies of the letters which you have received in regard to this dictionary? A. Why yes.

7580

x Q. 301. May I call at the office of the Union to-morrow and select additional sample copies to be annexed to your deposition?

7581

John W. Nolan—Cross.

MR. CARROLL: No.

x Q. 302. What does the witness say? A. I rely upon counsel; if he offers no objection I will allow you to.

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MR. CARROLL: Counsel may look over the files of letters and take what letters he wishes to offer in evidence if he so wishes but they cannot be attached to this witness's deposition.

x Q. 303. May I be permitted to inspect and take copies of selected letters from your file? A. Yes.

7583

x Q. 304. How much advertising in price did the Syndicate Publishing Company agree to take in connection with this dictionary proposition? A. I don't know as they agreed to take any particular price. In a talk I had with one of them I believe they told me the sales would be so large that they would pay for the cost of the advertising.

x Q. 305. You mean that the Union's portion of the receipts would pay for the advertising space occupied? A. Yes.

x Q. 306. And what was that proportion of the receipts or the amount of it? A. I cannot say.

7584

x Q. 307. Were the coupons paid for as advertising matter? A. I think not, no.

x Q. 308. Are you certain? A. I would not want to say for sure one way or the other, but I think not, we didn't consider them as part of the advertising; it was the displayed advertising that we used to feature the dictionary. We also relied upon the dictionary itself, the merits of it, after the people had bought it they showed it to their friends and relatives.

x Q. 309. I presume the reading notices and the coupons did not contain what has been termed the "warning" notice? A. After the date of October 21st I think that that matter was fully explained in the readers and also in the coupons.

x Q. 310. It was not explained in any of the reading notices you have produced in evidence? A. It was not?

x Q. 311. No. A. I can't say.

x Q. 312. You haven't produced any coupons here in evidence, have you? A. No.

x Q. 313. So you are not certain as to that? A. No, I am not certain as to that, but the displayed advertisement was what we used mostly to feature the proposition.

x Q. 314. Is your position such as you would necessarily know whether any one returned your books because they were dissatisfied or for any reason? A. Yes sir.

x Q. 315. Not a single book could be returned without your knowing of it? A. No sir.

x Q. 316. Is that correct? A. Every book that was returned was supposed to be reported to me and if there were any imperfect bindings they were reported to me.

x Q. 317. There were some instances of that sort? A. A few imperfect bindings.

x Q. 318. No case of a book being returned for any other reason? A. No, none that I know of, and I especially emphasized to the office help there that if there were any people who wished to return the book because they were dissatisfied with the contents I wanted to know it and none were reported.

x Q. 319. Did you at any time prior to October 21st explain to purchasers of your dictionary that

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John W. Nolan—Cross.

they were not published by the original purchaser of Webster's Dictionary? A. We had no occasion to.

x Q. 320. And you never did? A. The question was never brought up by any of the people who bought the dictionary.

x Q. 321. And you never explained it to them? A. No, did not consider it necessary, they seem to be satisfied.

7590

x Q. 322. Will you afford me an opportunity to inspect at the Union Office tomorrow morning the preliminary literature which you received bringing this dictionary proposition to your attention? A. You mean by that the literature previous to our taking it on?

x Q. 322. Yes. A. I don't believe I saved it, there was very little of it, just one or two communications and I think those were thrown away after we took it on.

7591

x Q. 323. Any correspondence on the subject? A. One or two letters from the Syndicate Company.

x Q. 324. Telling the merits of their scheme? A. Telling the merits of their scheme.

x Q. 325. May I inspect those letters? A. I considered those circular letters and treated them the same as advertising matter. We receive of course in newspaper offices a number of those letters, you might term them correspondence, but we consider them circular letters and if it is not anything we are interested in we throw them away just the same as if they were any advertisements.

7592

x Q. 326. Did any representative of the Syndicate Publishing Company come to Springfield and take any part in this dictionary campaign at any time? A. When we received notice that we were

supposed to be infringing upon the rights of the Merriam People we notified the Syndicate Publishing Company and one of their representatives came on here and talked the matter over and he told us they had absolutely no ground whatever.

x Q. 327. You were satisfied with that representation and went on with the campaign, is that correct? A. We went on with the campaign because we received no complaints from any persons who had bought them and we considered—

7594

x Q. 328. You went on with the campaign therefore? A. We considered that proof enough that the people who bought them were satisfied.

x Q. 329. And it was immaterial whether the Merriam Company was satisfied or not, is that correct? A. That was not considered. We didn't go into the dictionary with the idea of putting the Merriam Company out of business or anybody else, it was wholly with the idea of pushing a good thing as we saw it to get the good will of the people by giving them something they wanted at a bargain price.

7595

x Q. 330. And upon the assurance of the Syndicate Company that you had a legal right to continue to do what you had been doing you did continue to do it? A. We continued to sell the dictionary.

x Q. 331. Relying upon your assumed legal right to do so? A. Upon assurance from them that the book they were printing was within the law in every way and not infringing upon the publication of any other concern.

7596

x Q. 332. Did they guarantee you against loss in case of continuing the campaign?

MR. CARROLL: Objected to as irrelevant and immaterial.

7597

John W. Nolan—Re-Direct.

A. I believe Mr. Plummer conferred with him about that.

7598

x Q. 333. Have you since heard that a preliminary injunction has been granted in this case upon the ground that the Syndicate Book and advertisements were not in conformity with the legal rights of the several interested parties? A. Haven't heard there was an injunction, heard there was a suit instituted against the Syndicate Company.

x Q. 334. You never had heard there was an injunction? A. Didn't hear of any injunction, of course that was after we had wound up the dictionary proposition.

x Q. 335. And the Syndicate Company never notified you of the injunction? A. No interest to us as we were not using their dictionaries.

x Q. 336. That is all.

7599

RE-DIRECT EXAMINATION:

Q. 1. (By Mr. Carroll) Do you think the name "Webster" had much or anything to do with the sale of this dictionary?

MR. HALE: Objected to as incompetent, irrelevant and immaterial and as calling for mere opinion of the witness.

7600

A. I really think from my experience in the Circulation department that if we had offered a limp leather binding of some dictionary with a name other than "Webster" on it, if the dictionary was thoroughly up to date in every way, and the binding good, and the paper of good quality, the type of a proper size and so on, that the book being offered at that price there would have been thousands of them sold just the same.

John W. Nolan—Re-Direct.

7601

Q. 2. You think then that if this dictionary had had upon its cover simply the words "Good Dictionary" and in every respect just exactly as it was you could have sold just as many books?

MR. HALE: Objected to as incompetent, irrelevant and immaterial and as calling for mere opinion of the witness.

A. We could have put on the cover "The Union Dictionary" "The Springfield Union Dictionary, Thoroughly up to Date" and of course expanded along these lines that it was up to date and modern in every way, and I think we would have sold thousands of the dictionaries.

7602

Q. 4. Do you think there was any confusion with the so-called Webster's Dictionary published by the Merriams?

MR. HALE: Objected to as incompetent, irrelevant and immaterial and because numerous persons who have purchased these dictionaries from various newspapers including the Springfield Union have testified that they were so deceived.

7603

MR. CARROLL: Objected to as improper summary of the testimony.

MR. HALE: And further because it is obviously within the power of the defendants to call numerous purchasers of the dictionary to prove whether or not they were deceived.

7604

A. We think from our experience that there was no such confusion, simply the fact the Union was offering a dictionary at a bargain price of 98c and that the people were thoroughly satisfied in every way and never gave it any consideration

7605

John W. Nolan—Re-Cross.

whether it was published by the Merriam Company or some other concern.

Q. 5. Do you think the purchasers of the Webster's Dictionary you were selling cared anything at all about the publisher of the book?

MR. HALE: Same objection.

7606

A. No, I don't, because I think if they did we certainly would have had some of them return the books to us at the Union office.

Q. 6. Do newspapers as a rule permit their news columns to be used by advertising readers unless they are getting some practical benefit from following the scheme?

MR. HALE: Objected to as incompetent, irrelevant and immaterial.

A. No, they do not.

7607

Q. 7. What did you do if a book was returned with an imperfect binding? A. We gave them a new copy and also stated if they found any imperfection in that one we would gladly replace that.

Q. 8. Were many books returned for that reason? A. Very few.

That is all.

7608

RE-CROSS EXAMINATION:

x Q. 1. (Mr. Hale) Did you interview any of the residents of Springfield who made affidavit on behalf of the Merriam Company of this city? A. No, I did not.

x Q. 2. Do you know who did? A. Mr. Plummer took that matter up, I believe, I think there was somebody, I don't know who it was.

x Q. 3. You knew there was somebody who did interview these persons? A. Went around to see what the objections were and the substance of it was that they thought they had got "stuck" on the price, 98c. Of course, we stood ready to refund the money to them but none of them availed themselves of that offer and said they got more than their money's worth.

x Q. 5. Then did you hear of the fact that some people who purchased the dictionary from the Springfield Union claimed to have been deceived? A. After we heard of the suit instituted by the company and after the sale of the books was all off. That was simply on the affidavits that were made to the Merriam people, I believe, and I may add that I was told that these people were in a way led in their questions, in the way they were put to them, so that they could make up an affidavit favorable to the Merriam Company.

7610

7611

MR. HALE: The answer of the witness beginning "I may add" is objected to as incompetent, irrelevant and immaterial and unresponsive and a motion is hereby made to strike it out.

x Q. 6. Who told you that? A. I don't remember the name now. I don't remember the individual, but I know that that was my impression and the impression became very deep seated after I heard who some of those people were who filed the affidavits.

7612

x Q. 7. You don't know that these same people were called as witnesses and examined and cross-examined by counsel for both parties?

MR. CARROLL: And if so you don't know the further fact on cross examination they

7613

Lauren Carroll—Direct.

practically admitted they didn't care who the publisher was.

MR. HALE: The statement is objected to as highly improper in a due and proper cross-examination.

A. I supposed they would be as long as they filed affidavits.

7614

(DEPOSITION CLOSED.)

(Signature of Witness Waived.)

Complainant's counsel inquires whether defendant intends to produce the book referred to by the Witness, Peck, as the "Bond Dictionary".

7615

Defendant sees no reason why this book should be produced by the defendant and states further that the book never was owned by the defendant and is no longer in the possession of the defendant and the defendant's counsel has not been able to ascertain its whereabouts.

LAUREN CARROLL, a witness called by and on behalf of the defendants, testified as follows:—

(Oath and Signature Expressly Waived by counsel for complainant.)

7616

MR. HALE: All objections upon all grounds, except as to oath and signature, shall be considered as taken and reserved to all parts of Mr. Carroll's testimony without being subsequently stated.

MR. CARROLL: On the 27th day of October, 1911, I wrote the following letter to Mr. Edward T. Roe.

1905

Lauren Carroll—Direct.

7617

"October 27th, 1911.

Mr. Edward T. Roe,
530 North Troy Street,
Chicago, Illinois.

DEAR SIR:—

Messrs. Stewart & Co., of Baltimore, Maryland, clients of ours, have been notified by G. & C. Merriam of Springfield, Massachusetts, publishers of a Webster's dictionary, that the title page of a dictionary which they were selling now known as "Webster's New Century Dictionary" is an infringement upon the rights of the Merriam Co., Messrs. Cupples & Leon, of this City, who are the publishers of the dictionary which was being sold by Stewart & Co., have had a talk with the editors of the Christian Herald, who originally published this dictionary under the name of "Crown Dictionary" and the dictionary, we understand from the Christian Herald, was compiled by you. The title page of the dictionary says that it is based upon the unabridged dictionary of Noah Webster, L.L.D., revised and brought up to date in accordance with the most recent eminent English and American authorities, by Edward T. Roe, L.L. B. The editors of the Christian Herald say that they have always understood that the title page correctly stated the facts, and that the book so compiled by you was based upon the unabridged Webster's dictionary. Will you be so good as to let us know if they are correct in their opinion. and if as a matter of fact in compiling this dictionary you did base it largely upon Webster's unabridged dictionary, the copyright of which has now expired. The Merriam Co. claim that the

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Lauren Carroll—Direct.

dictionary in question is not in any substantial degree whatsoever based on Webster's unabridged dictionary, and if the fact is contrary to this we would be very much obliged to have you so inform us.

We are,

Very truly yours,

(Sgd.) GOULD & WILKIE.

7622

MR. HALE: The letter and its contents are objected to as incompetent, irrelevant and immaterial as a transaction between counsel for defendant and a third person and in no way binding upon the complainant but a matter really *res inter alios*. The letter is also objected to as relating to the production of unsworn statements by Mr. Roe which is evidence in no sense against the complainant and because Mr. Roe himself is not called as a witness, sworn, examined and cross examined in accordance with the rules of legal proceedings.

7623

MR. CARROLL. (Deposition continued) I obtained the address to which this letter is addressed from the Christian Herald Company in New York and four days later I received in the regular course through the mail this letter addressed to my firm Gould & Wilkie, #2 Wall Street, and I offer that letter in evidence.

7624

MR. HALE: Objected to as incompetent, irrelevant and immaterial as not properly identified and as a mere written declaration of some unknown person who has not been called and sworn and examined as a witness in accordance with the rules governing the taking of testimony in equity and objection is made to spreading the same upon the records as a gross abuse of the

Lauren Carroll—Direct.

7625

method of taking proof before examiner and notice is given that motion will be made forthwith to strike out both this letter and the previous letter referred to by this witness.

Subject to this objection the letter is offered in evidence, received in evidence and is as follows:

"530 N. TROY STREET, CHICAGO,

OCTOBER 30, 1911.

7626

MESSRS. GOULD & WILKIE,
No. 2 Wall Street,
New York City.

GENTLEMEN: Replying to yours of the 27th, have to say that the statement on the title page of the dictionary which I sold to the Christian Herald, to the effect that it is "based on the unabridged dictionary of Noah Webster, L. L. D., revised and brought up to date," etc., is correct and a comparison of the book with the 1848 edition of Webster's unabridged dictionary will show that it is nearer in all essentials, including orthography, pronunciation and definitions, than are any of the so-called Webster's dictionaries now being published by the G. & C. Merriam Company or by its ally, the American Book Company.

7627

Very truly yours,
EDWARD T. ROE."

7628

MR. HALE: The motion to strike out said letter upon all the grounds stated is hereby renewed.

MR. CARROLL: (Deposition continued) After the motion for preliminary injunction was filed in this case and served upon counsel for defendant I sent

7629

Lauren Carroll—Direct.

to our correspondents in Chicago an affidavit embodying these facts requesting them to have Mr. Roe sign it so that it might be used upon the motion for preliminary injunction and they replied that they had seen Mr. Roe at his residence, 530 North Troy Street—

7630

MR. HALE: I object to a statement of the substance of the correspondence between this witness and his Chicago correspondents and especially as to the unsworn statements of the unknown correspondent as to what the uncalled witness, Roe, stated to him.

MR. CARROLL: (Deposition continued) And that he stated that the contents of the letter were true but that since writing it he had been approached by representatives of the Merriam Company and had promised them not to give any affidavit in the matter.

7631

MR. HALE: The entire deposition of this witness is objected to as wholly incompetent and immaterial and motion is made to strike it out and notice is here given that said motion will be brought up at a near and convenient time and in advance of the final hearing to suppress this deposition upon all of the grounds stated.

CROSS EXAMINATION by Mr. Hale:

7632

MR. HALE: Have you a copy of the affidavit which you sent to your Chicago correspondents for the purpose of being executed by Mr. Roe? A. I think I have.

MR. HALE: Will you supply me with a copy of it? A. If I have one I will.

MR. HALE: What is the name of your Chicago correspondent?

Lauren Carroll—CROSS.

7633

MR. CARROLL: Matz, Fisher & Boyden.

MR. HALE: Have you the letter which this correspondent sent to you referring to their interview with Mr. Roe? A. I think so, surely not here, but perhaps in the office.

MR. HALE: The motion to strike out this entire deposition is here renewed upon all the grounds stated in the objections.

DEPOSITION CLOSED.

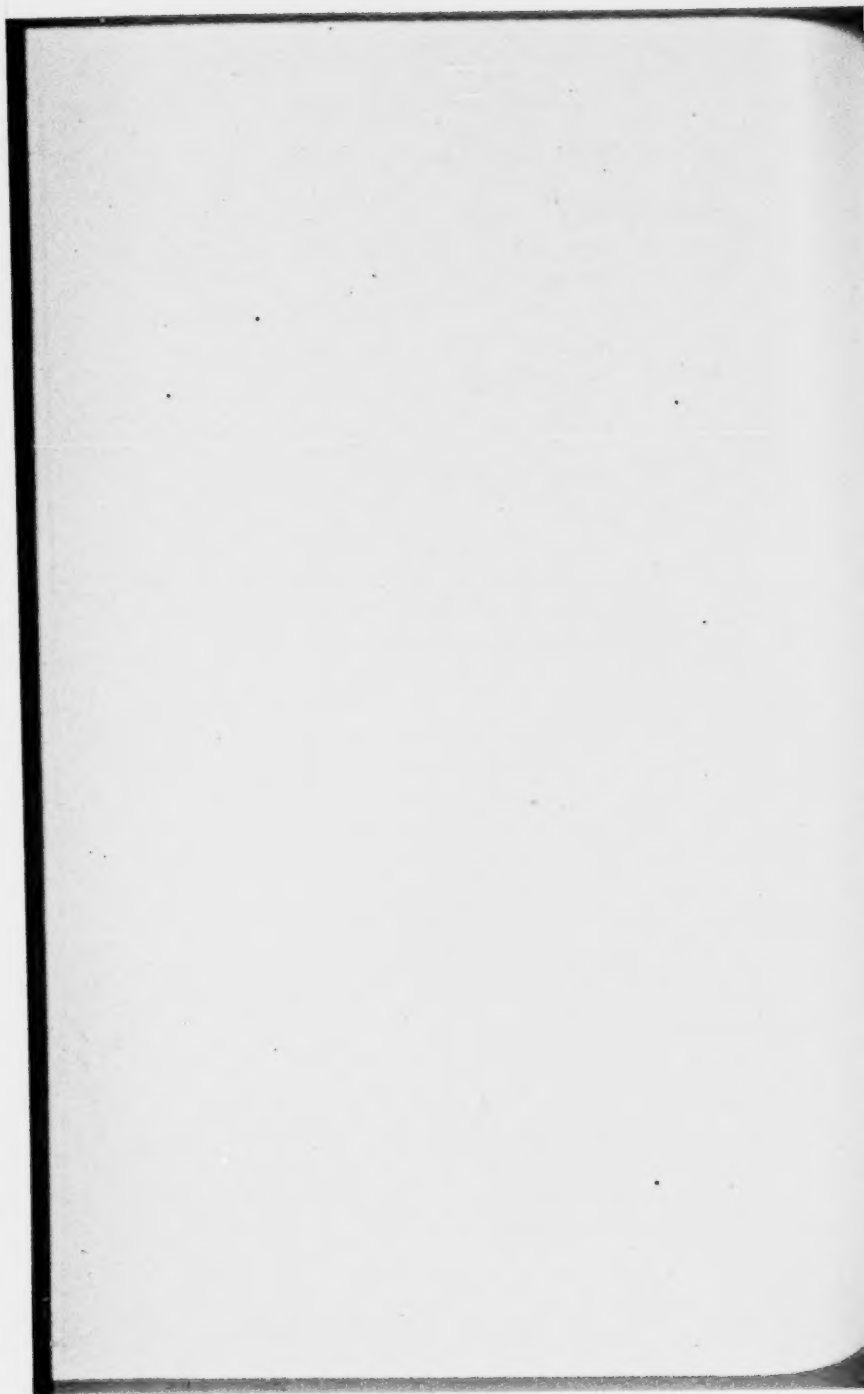
7634

Testimony on behalf of Defendants at Springfield, Mass., closed.

Notice of taking depositions and certificate of Special Examiner omitted from printed record by consent.

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At a Stated Term of the District Court
of the United States for the South-
ern District of New York, held at the
Court Room of said Court, in the
Borough of Manhattan, City of New
York, on the 30th day of September,
1912:

Present—HON. JULIUS M. MAYER, District Judge.

G. & C. MERRIAM COMPANY,
Complainant.

vs.

CUPPLES & LEON COMPANY,
Defendant.

Equity No.
8—161.

7642

G. & C. MERRIAM COMPANY,
Complainant.

vs.

SYNDICATE PUBLISHING COM-
PANY,
Defendant.

Equity No.
8—162.

7643

Upon reading and filing defendant's motion to
reopen the above-entitled cause and for leave to
give testimony in sur-rebuttal, and the affidavit
of Lauren Carroll, verified the 23rd day of Sep-
tember, 1912, and of Hugh A. Bayne, verified the
23rd day of September, 1912, in support of said
motion, and the affidavit of William B. Hale, veri-
fied the 26th day of September, 1912, filed in op-

7644

7645 position thereto, and after hearing counsel for the respective parties, it is hereby

ORDERED that this cause be and the same hereby is reopened, and the defendant granted thirty (30) days from the date of this order within which to take and introduce additional testimony and proofs, *provided*, and this order is upon the express condition, that said additional testimony and proofs shall be limited to testimony to rebut the testimony heretofore given by complainant's witness, C. O. Sylvester Mawson, and shall extend to no matters not touched upon by said witness Mawson, and *provided further* that this cause be and the same hereby is set peremptorily for final hearing upon the first court day for the hearing of equity cases in the month of November, 1912, with leave to complainant to have an adjournment thereof, to take further proofs in rebuttal of said new proofs of defendant, if it shall so elect. The time of complainant to be fixed on application to the court. Defendant shall not be entitled to have any adjournment of the hearing of this cause because of any fact arising out of the taking of its testimony under this order. In all other respects the motion herein is denied.

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JULIUS M. MAYER,
Judge, United States District Court,
Southern District of New York.

7648

DISTRICT COURT OF THE UNITED
STATES,

7649

SOUTHERN DISTRICT OF NEW YORK.

G. & C. MERRIAM COMPANY,
Complainant.

against

CUPPLES & LEON COMPANY,
Defendant.

Equity
8—161.

7650

G. & C. MERRIAM COMPANY,
Complainant.

against

SYNDICATE PUBLISHING COM-
PANY,
Defendant.

Equity
8—162.

7651

TESTIMONY taken by and on behalf of the de-
fendants, pursuant to order of this Court, dated
September 30th, 1912, before JOHN A. SHIELDS,
Esq., a Standing Examiner of this Court, at the
offices of Messrs. Gould & Wilkie, 2 Wall Street,
New York City, beginning at two o'clock P. M.
on Monday, October 28th, 1912, pursuant to no-
tice hereto annexed.

7652

APPEARANCES:

For Defendant Cupples & Leon Company,
GOULD & WILKIE.

LAUREN CARROLL, Esq., of Counsel.

7653 *Prof. Harry Thurston Peck—Direct.*

For Defendant Syndicate Publishing Company,
STRONG & CADWALADER,
LAUREN CARROLL, Esq., of Counsel.

For Complainant,
WILLIAM B. HALE, Esq.

7654 IT IS HEREBY STIPULATED by and between counsel for the respective parties that the testimony of all witnesses, called pursuant to the above mentioned order, shall be taken down stenographically by a competent stenographer, appointed by the Standing Examiner, and subsequently transcribed and reduced to writing for the use of the Court.

IT IS FURTHER stipulated that the signatures of all witnesses shall be waived.

7655

PROFESSOR HARRY THURSTON PECK, a witness recalled for defendants in sur-rebuttal, having been duly cautioned and sworn, testified as follows:

DIRECT EXAMINATION by Mr. Carroll:

Q. 1. Did you ever hear of C. O. Sylvester Mawson before this suit? A. I think I had heard his name once, but if so it was from reading a preface from the Webster's New International Dictionary.

7656

Q. 2. How is he described in that preface?

MR. HALE: Objected to as calling for secondary evidence, and therefore incompetent.

A. He is described—after mentioning the general editors and principal editors of the New In-

Prof. Harry Thurston Peck—Direct.

7657

ternational, the editor in chief, Dr. Harris, says, "There has been connected with the work in a less formal way C. O. Sylvester Mawson, for many years a resident of India, who has furnished much information regarding the East Indian ways," and there is also mentioned one other gentleman who is also connected in a less formal way. Apart from that I have never heard of him.

Q. 3. Is he mentioned in any of the English books of reference?

7658

MR. HALE: Same objection.

A. Not so far as I have been able to discover.

Q. 4. In XQ23 of Mr. Mawson's testimony, he was asked if he had ever heard of Professor Mahn. He answered, "For the moment I cannot think him up." Who was Professor Mahn?

MR. HALE: Objected to as irrelevant and immaterial.

7659

A. Professor Mahn was Professor in Berlin, and did some revising as is stated in the preface to the New International Dictionary,—Webster's New International Dictionary. He did the revision in 1864, and quite a point is made of his connection with the work.

Q. 5. At cross question 31 the witness Mawson was asked: "Did you ever hear of Carl Verner?" and he answered "I have but I cannot recall very clearly." Who was Carl Verner?

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MR. HALE: Same objection.

A. Carl Verner was a Dane studying in Germany, and he published a work and a dissertation or monograph in Kuhn's Zeitschrift, which is

7661

Prof. Harry Thurston Peck—Direct.

nothing but Kuhn's Journal. He published a monograph, the principle of which upset and absolutely revolutionized all the old philology after that. Philology, instead of having been partly guess work, became almost an exact science. He is one of the greatest men in the history of philology, if I remember, during the last thirty-five years.

7662

Q. 6. Would any lexicographer worthy of the name know about Carl Verner?

MR. HALE: Objected to as incompetent, irrelevant, immaterial, as leading, and as calling for a conclusion; also as argumentative.

7663

A. He is universally recognized as one of the two greatest philologists of modern times, and any lexicographer, even though he were a specialist in some other language, as in the Indian languages, would know him, as surely as a lawyer, a trained lawyer, who was trained in the history of law, would know Blackstone or Kent.

Q. 7. In answer to cross question 33, the witness Mawson said, "I only claim to be a specialist on Oriental terms." Would a specialist on Oriental terms know about Rask?

7664

MR. HALE: Same objection, and as calling for a conclusion.

A. He certainly would, if he knew his subject historically; that is, if he knew the Indian terms as a colonial.

Q. 8. Who was Rask? A. Rastus Rask was a Norwegian, who at the end of the eighteenth century, made extensive expeditions and travels and studies in Persia and Asia, the western part

Prof. Harry Thurston Peck—Direct.

7665

of Asia. He was the first to discover—he was the first who brought to Europe any knowledge of the old Persians. From his explorations and publications came the famous Grimme's law, which Mr. Mawson mentioned in the testimony. I was going to say that Dr. Rask was the pioneer of modern philology.

MR. HALE: The question is further objected to as not in rebuttal, because it does not appear from the records that Mr. Mawson was asked about Dr. Rask, concerning whom this witness has testified, the records showing that Mr. Carroll asked the witness Mawson about a man named Raskin.

7666

Q. 9. The witness Mawson, in answer to cross question 60, said, "We do not use the term 'Websterian' in connection with our dictionaries. To me the word has no special significance." Is that true? A. It is used three times in the preface in the New International Dictionary; twice it says the "Websterian Tradition", and once, "The Websterian System."

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Q. 10. In his direct examination, the witness Mawson, in questions 84 to 87, gives a list of so-called two word phrases which appear in defendant's dictionaries designated as nouns. He states that "This is not Websterian." Have you found any examples of two word phrases designated as nouns in the Webster 1847 dictionary?

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MR. HALE: Objected to as incorrectly reciting the testimony of the witness Mawson, he having used no such phrase in that connection, and counsel is requested to please point it out.

7669

Prof. Harry Thurston Peck—Direct.

A. I found, without any effort at all, merely searching through the book, a good many unhyphenated two word phrases which were characterized as nouns, and so entered, and some—a great number that were so entered and not characterized at all. There seemed to be no system. For example—

7670

MR. HALE: The answer is objected to as not responsive, and also as secondary, because it purports to recite the contents of certain books, instead of pointing it out. The question was a direct question, and could and should have been **answered** or no.

7671

A. (Continued) The list, or a partial list is, for example: "Star fish", marked as a noun without a hyphen. "Arsenic acid", no hyphen, but marked as a noun. "Arsenious acid", no hyphen, marked as a noun. "Bas Bleu", a French word—French phrase, no hyphen, but marked as a noun. "Jerusalem Artichoke", no hyphen, marked as a noun. "John Bull", no hyphen, but marked as a noun. "John Tory", no hyphen, marked as a noun. "Naphthalic acid", no hyphen, marked as a noun. "Naval officer", marked as a noun, no hyphen. "Neat's foot oil" three words, noun,—that is a three word phrase, marked as a noun, and no hyphens at all. "Paixhan Gun", no hyphen, marked as a noun. "Pandean pipes", no hyphen, and marked as a noun. "Parish clock", no hyphen, marked as a noun. "Privy Chamber", no hyphen, marked as a noun. "Privy Council", no hyphen, marked as a noun. "Prong hoe", no hyphen, marked as a noun. "Manilla hemp" is

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Prof. Harry Thurston Peck—Direct.

7673

another one. Well, there are a few words, for instance, "St. Anthony's fire".

Q. 11. Is this a complete list? A. Why, it is not a complete list made from an examination of the whole dictionary.

Q. 12. Are there any other interesting examples before you?

MR. HALE: Objected to unless the witness will point out himself in the printed book, and not answer generally as to contents of books, not produced.

7674

A. Why, I would be very glad to do it. Yes, in some cases, in Latin two-word phrases so-called, there were a great many marked as nouns without any hyphens, and a great many others that were hyphenated. It is also interesting to me that three-word phrases, as "St. Anthony's fire", no hyphen, but a noun. "St. John's bread", marked as a noun. "St. John's Wort" no hyphen, marked as a noun. And then it seemed to me strange that "Stabat Mater" no hyphen, but marked as a noun—the inconsistency of having "Stabat Mater" so put down, but "Alma Mater" which is a very common thing—all these are in the 1847 Webster—and "Alma Mater" is not so marked, not hyphenated, and not marked as anything. There are a good many more, but that is a peculiarity that runs through the 1847 Webster.

7675

Q. 13. At question 91 of the witness Mawson's direct testimony he offers a list of seventy-five words, which he states are given in defendant's dictionary in what he designates as the English form as opposed to what he designates as the accepted American form. In answer to cross ques-

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Prof. Harry Thurston Peck—Direct.

tion 37 he amplifies the meaning of this distinction, and says: "The authorities I depend upon are the English dictionaries referred to in Complainant's parallel exhibit, and by English forms of spelling I mean the forms which are commonly used by such dictionaries as distinguished from the forms which are approved, and are now generally adopted by the best American dictionaries." In cross question 43 he says, "Unless I find the same spelling in Webster's New International Dictionary, Funk & Wagnall's Standard Dictionary, and in the Century Dictionary, I would not use the term 'American spelling', unless it was common." In answer to cross question 46, he said, "It will be found that the form adopted and accepted by Webster is the one approved of by the other two dictionaries, especially in the Standard Dictionary, which is ultra-American in its spelling."

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MR. HALE: It is objected to that counsel has not fully quoted the entire answer to cross question 46, and the real meaning of the words quoted is therefore not apparent.

MR. CARROLL: An inspection of the answer will show that sufficient has been given to plainly show the real meaning.

7680

(Question continued) Have you prepared a fuller list of these seventy-five words showing exactly how they are spelled in the Webster 1847, in Defendant's books, in Worcester's, Funk & Wagnall's Standard and the Century Dictionary?

MR. HALE: Objected to as incompetent, irrelevant and immaterial, because it is immaterial whether or not the defendants'

Prof. Harry Thurston Peck—Direct.

7681

spelling conforms to the Worcester, the Century or various other dictionaries, the issue being as to whether or not it conforms to Webster's dictionary of 1847.

MR. CARROLL: The list is offered in rebuttal of Mr. Mawson's testimony in which he emphasized particularly his contention that the defendants' book was proved to be a book of English origin, by means of the spellings included in his list. The purpose of this counter-list is to show that in the majority of the cases cited by the witness Mawson, the spelling given in defendants' book is not only the approved English spelling, but also that preferred by all American dictionaries, except the Webster 1847, and that therefore it was not only right but necessary that the editor of defendants' book in revising and bringing it up to date should change the spelling to conform to the approved form in all English speaking countries.

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MR. HALE: It is suggested that pointing out departures from the Webster 1847 edition upon which alone defendants based its right to call its dictionary "Webster" is in no way any rebuttal of Mr. Mawson's testimony, that defendant's book did not follow the 1847 edition.

MR. CARROLL: How strictly in rebuttal this testimony is will appear from the passages quoted from Mr. Mawson's testimony.

7684

A. I have prepared such a list, and it is as follows:

Prof. Harry Thurston Peck—Direct.

ORTHOGRAPHY.

SPELLING ADOPTED BY WEBSTER'S NEW ILLUSTRATED DICTIONARY COMPARED WITH THAT OF WEBSTER'S NEW UNABRIDGED, 1847. ALSO COMPARED WITH THE RECOGNIZED AMERICAN AUTHORITIES, THE STANDARD DICTIONARY, THE CENTURY AND WORCESTER.

Forms in Defendants' Books: *Forms in 1847 Webster's alleged*
Defendants' dictionary here re- by Complainant's witness
 7686 *ferred to simply as "Illus. Mawson to be the recognized*
trated." *and accepted American form:*

ABETTER

ABETTOR

"Illustrated": "abetter or abet- Webster 1847 gives only the form
 tor." "abettor."

Preferred by Worcester in which (A hybrid form,—a Latin termi-
 "abettor" is allowed only as a nation on an Anglo-Saxon
 law term. base.)

Preferred by the Century Dic-
 tionary.

7687 Allowed by the Standard Dic-
 tionary.

ACCOUTRE

ACCOUTER

The only form allowed by Wor- Webster 1847 gives
 cester. "accouter"

Preferred by the Century Dic- accoutre }

Allowed by the Standard Dic-
 tionary.

The proper French form.

ACCOUTREMENTS

ACCOUTERMENTS

The only form in Worcester.

Preferred by the Century Dic-
 tionary.

Allowed by the Standard Dic-
 tionary.

The proper French form.

Webster 1847 gives

The spell-
 ing "accou-
 terments" changes the
 "accouterments" pronunciation
 accoutrements } of this word
 to a rustic
 one.

Prof. Harry Thurston Peck—Direct.

7689

ADZE

ADZ

“Illustrated”: “adze or adz.”

The only form in Worcester.

Allowed by the Century Dictionary.

Allowed by the Standard Dictionary.

AIDE-DE-CAMP

AID-DE-CAMP

7690

The only form in Worcester.

Preferred by the Century Dictionary.

Preferred by the Standard Dictionary.

The proper French form.

Webster gives this word the French pronunciation while altering the French form. In this he stands inconsistent and alone.

APPAL

APPALL

Preferred by Worcester.

Preferred by the Century Dictionary.

Preferred by the Standard Dictionary.

Inconsistent with Webster's claim to prefer always the simpler form.

7691

AXE

AX

“Illustrated”: “axe, or ax.”

The only form in Worcester.

Preferred by the Standard Dictionary.

Allowed by the Century Dictionary.

BANIAN

BANYAN

7692

“Illustrated”: “banian or ban-yan.”

Preferred by Worcester.

Preferred by the Century Dictionary.

Preferred by the Standard Dictionary.

Webster 1847 also gives and separately defines the form “banian.”

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7693

BOULDER

BOWLDER

Preferred by Worcester.
Preferred by the Century Dic-
tionary.
Preferred by the Standard Dic-
tionary.

Webster 1847 gives "boulder, see
boulder."

BRAZIER

BRASIER

7694 Preferred by Worcester.
Preferred by the Century Dic-
tionary.
Preferred by the Standard Dic-
tionary.

Webster 1847 gives "brazier, see
brasier."

CAULDRON

CALDRON

"Illustrated": "cauldron, see
cauldron."

Permitted by the Century Dic-
tionary.

7695 Standard Dictionary says "same
as caldron."

CARBURETTED

CARBURETED

The only form in Worcester.
Permitted by the Century Dic-
tionary.

CORNELIAN

CARNELIAN

7696 "Illustrated": "Cornelian, also Webster 1847 gives "cornelian,
carnelian."
Preferred by Worcester.
Standard Dictionary says "same
as carnelian."

Prof. Harry Thurston Peck—Direct.

CHARTOGRAPHER

CARTOGRAPHER

Illustrated: "Cartographer, cartographic, etc., see chartographer, etc." Etymologically incorrect.

Preferred by the Century Dictionary.

Etymologically correct.

CHEQUE

CHECK

In the "Illustrated" the form Webster 1847 gives "cheque" is defined and synonym "check" given. "Check" also given and defined as "draft," etc.

Allowed by Worcester.

Allowed by the Century Dictionary.

Allowed by the Standard Dictionary.

COTILLION

COTILLON

"Illustrated": cotillion, also cotillon." Webster 1847 gives "cotillon }

Preferred by Webster's New International Dictionary (1909). cotillon}"

Preferred by the Century Dictionary. See preface to Webster's New International Dictionary, under Orthography, where form

Preferred by the Standard Dictionary. "cotillon" rejected.

COULTER

COLTER

Allowed by Worcester.

Allowed by the Standard Dictionary, which defines it under its own heading.

Webster 1847 gives "coulter, see colter."

7701

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COUNCILLOR

COUNCILOR

The only form in Worcester.
Allowed by the Century Dictionary.

CYCLOPAEDIA

CYCLOPEDIA

7702

"Illustrated": "Cyclopaedia or Webster 1847 gives
cyclopaedia." "cyclopaedia }
cyclopedia }"

The only form in Worcester.
Allowed by the Century Dictionary.
Standard Dictionary says "same
as cyclopedia."

DEFLOWER

DEFLOUR

7703

Preferred by the Century Dictionary. Etymologically incorrect.
Preferred by the Standard Dictionary.
Etymologically correct.

DETECTOR

DETECTER

Worcester defines under this Etymologically incorrect.
form.
Preferred by the Century Dictionary.
Preferred by the Standard Dictionary.
Etymologically correct.

7704

DIARRHOEA

DIARRHEA

The only form in Worcester.
Allowed by the Standard Dictionary.

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7705

DESPATCH

DISPATCH

“Illustrated”: “despatch or dispatch”; “dispatch, same as despatch.”

Webster 1847 gives “despatch, see dispatch.”

Preferred by Worcester.

Etymologically incorrect as shown by Webster 1847 in discussing its origin and original meaning.

Preferred by the Standard Dictionary.

Etymologically correct.

(Fr. dépêche.)

Approved by Century Dictionary.

7706

DISTIL

DISTILL

The only form in Worcester.
Preferred by the Century Dictionary.

The less simple form.

Preferred by the Standard Dictionary.

The simpler form.

DOLOUR

DOLOR

7707

Allowed by the Century Dictionary.

Allowed by the Standard Dictionary.

DULNESS

DULLNESS

The only form in Worcester.
Preferred by the Standard Dictionary.

The less simple form.

The simpler form.

7708

ENCYCLOPAEDIA

ENCYCLOPEDIA

“Illustrated”: “Encyclopaedia or encyclopedia.”

Webster 1847 gives

The only form in Worcester.

“encyclopedia }
encyclopaedia”

Allowed by the Century Dictionary.

Allowed by the Standard Dictionary.

7709

*Prof. Harry Thurston Peck—Direct.***FAECAL****FECAL**

"Illustrated": "fecal, same as Webster 1847 gives "faecal, see faecal."

Worcester gives cross reference to "fecal." Webster also gives and separately defines "faeces" with no cross reference to "feces."

Allowed by the Century Dictionary.

Standard Dictionary says "same as fecal."

7710

FOETAL**FETAL**

"Illustrated": "fetal same as foetal."

Standard Dictionary says "same as fetal."

FOETUS.**FETUS.**

"Illustrated": "fetus, same as Webster 1847 gives "foetus, see fetus."

Allowed by Worcester.

Standard Dictionary says "same as fetus."

Webster 1847 gives "foetus, see fetus." It also gives and defines "foeticide." Form "feticide" not given at all.

7711

GAVOTTE.**GAVOT.**

Allowed by the Century Dictionary.

Allowed by the Standard Dictionary.

The correct French form.

Webster 1847 gives "gavot (Fr. gavotte)."

GAIETY.**GAYETY.**

Approved by Worcester.

Preferred by the Standard Dictionary.

Webster 1847 gives "gaiety, see gayety."

7712

GAILY.**GAYLY.**

Allowed by Worcester.

Preferred by the Standard Dictionary.

Webster 1847 gives "gaily, from gay and better written 'gayly,' " then gives full definition.

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7713

GELATINE

GELATIN

“Illustrated”: “gelatine, also gelatin.”

The only form in Worcester.

Allowed by the Standard Dictionary.

GLYCERINE

GLYCERIN

“Illustrated”: “glycerine, also glycerin.”

The only form in Worcester.

Allowed by the Standard Dictionary.

7714

GRAMME

GRAM

“Illustrated”: “gramme, also gram,” “gram, see gramme.” Webster 1847 gives

Allowed by the Standard Dictionary.

The correct French form.

“gram }
gramme}” It also gives
“gramme, see gram.” “It
would be desirable to have this
word ‘gram’ Anglicized.”

7715

GUERILLA

GUERRILLA

The only form found in Worcester.

Allowed by the Century Dictionary.

Allowed by the Standard Dictionary.

EMBITTER

IMBITTER

“Illustrated”: “embitter, also imbitter.”

Approved by Worcester.

Preferred by the Standard Dictionary.

7716

7717

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EMBOSOM

IMBOSOM

Approved by Worcester.
Preferred by the Standard Dictionary.

ENCASE

INCASE

“Illustrated”: “incase, same as Webster 1847 gives “encase, see encase.”

7718

Approved by Worcester.
Approved by the Standard Dictionary.

ENSNARE

INSNARE

Approved by Worcester.
Preferred by the Standard Dictionary.

Webster 1847 gives “ensnare, see insnare.”

INSTIL

INSTILL

7719

The only form in Worcester.
Preferred by the Century Dictionary.
The simpler form.

The less simple form.

ENTHRALL

INTHRALL

Approved by Worcester.
Allowed by the Standard Dictionary.
Preferred by the Century Dictionary.

Webster 1847 gives “enthrall v. t. to enslave (see inthrall).”

7720

ENWRAP

INWRAP

Approved by Worcester.
Approved by the Standard Dictionary.
Approved by the Century Dictionary.

Webster 1847 gives “enwrap v. t. to envelop (see inwrap).”

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7721

JOUST

JUST

Standard Dictionary says "same as just." Webster 1847 gives "Joust, see just."

Approved by Century Dictionary. Etymologically incorrect and phonetically misleading.

The correct French form.

KILOGRAMME

KILOGRAM

Allowed by the Century Dictionary. Webster 1847 gives "kilogram }

Allowed by the Standard Dictionary. kilogramme}"

The correct French form.

7722

LEDGER-LINE

LEGER-LINE

The only form in Worcester.

Webster 1847 gives "ledger-line, see leger-line."

MAUGRE

MAUGER

The only form in Worcester.

The only form in the Century Dictionary. Webster 1847 gives "mauger }

Approved by the Standard Dictionary. maugre}"

7723

MULLEIN

MULLEN

The only form in Worcester.

The form used by Prof. Asa Gray (botanist). Webster 1847 gives "mullen }

Approved by the Standard Dictionary. mullein}"

Allowed by the Century Dictionary.

7724

7725

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OCHRE

OCHER

The only form in Worcester.
 Approved by the Standard Dictionary.
 Approved by the Century Dictionary.

Webster 1847 gives
 "ocher}
 ochre{"

OYES

OYEZ

7726

"Illustrated": "oyes, also
 oyez."
 Preferred by Worcester.
 Preferred by the Standard Dictionary.
 Preferred by the Century Dictionary.

PAEDOBAPTISM

PEDOBAPTISM

7727

"Illustrated": "paedobaptism,
 also pedobaptism." "Pedobaptism,
 same as paedobaptism."
 Approved by Standard Dictionary.
 Allowed by the Century Dictionary.

PHOSPHURETTED

PHOSPHURETED

The only form in Worcester.
 Allowed by the Century Dictionary.
 Allowed by the Standard Dictionary.

7728

PURR

PUR

Preferred by the Century Dictionary.
 Preferred by the Standard Dictionary.
 Approved by Worcester.

Webster 1847 gives "Purr v. i.
 to murmur as a cat (see pur)."

Form "pur" never seen in books
 or periodicals.

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7729

REINFORCE

Preferred by the Century Dictionary.
 Approved by the Standard Dictionary.

REENFORCE

Webster 1847 gives "reinforce, see re-enforce." "re-inforce-ment, see re-enforcement."

REYNARD

"Illustrated": "reynard, n. the fox"; "renard, another form of reynard."
 Preferred by the Century Dictionary.
 Preferred by the Standard Dictionary.

RENARD

Webster 1847 defines "renard," then says, "this word is also spelled 'reynard.'" It also gives and separately defines the form "reynard."

7730

RENCONTRE

"Illustrated": "rencontre, also rencounter."
 Allowed by the Century Dictionary.
 Preferred by the Standard Dictionary.
 Allowed by Worcester.
 Correct French form.

RENCOUNTER

Webster 1847 gives "rencounter (Fr. rencontre)."

7731

ROUBLE

Allowed by the Century Dictionary.

RUBLE

Webster 1847 gives "rouble, see ruble."

SARSENET

Preferred by the Century Dictionary.
 Preferred by the Standard Dictionary.

SARCENET

7732

7733

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SAVANNAH

SAVANNA

"Illustrated": "Savannah, also
Savanna."

Allowed by the Century Dic-
tionary.

Allowed by the Standard Dic-
tionary.

7734

SCATHE

SCATH

Approved by Worcester.

Preferred by the Century Dic-
tionary.

Preferred by the Standard Dic-
tionary.

The Century Dictionary says of
this form "scath," an errone-
ous spelling of "scathe."

SILLIBUB

SILLABUB

7735

"Illustrated": "sillibub, also
sillabub; syllabub."

Preferred by the Century Dic-
tionary.

Preferred by the Standard Dic-
tionary.

Worcester has "syllabub."

SYLVAN

SILVAN

Preferred by Worcester.

Approved by the Standard Dic-
tionary.

7736

Preferred by the Century Dic-
tionary.

Webster 1847 says of "silvan":
"It is also written sylvan." It
also gives and separately de-
fines "sylvan." It also spells
the word "sylvan" in its de-
finition of "woody."

SYRUP

SIRUP

Approved by Worcester.

Approved by the Standard Dic-
tionary.

Preferred by the Century Dic-
tionary.

Webster 1847 gives "syrup, see
sirup."

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773

SKILFUL

SKILLFUL

The only form in Worcester. The less simple form.
 The preferred form in the Cen-
 tury Dictionary.
 The preferred form in the
 Standard Dictionary.
 The simpler form.

SUBPOENA

SUBPENA

7738

The only form in Worcester. Webster 1847 gives
 Preferred by the Standard Dic- "subpena }
 tionary. subpoena }"
 Preferred by the Century Dic-
 tionary.

SULPHURETTED

SULPHURETED

7739

The only form in Worcester.
 Allowed by the Century Diction-
 ary.
 Allowed by the Standard Dic-
 tionary.

TAILAGE

TALLAGE

"Illustrated": "tailage, also Webster 1847 gives
 tallage."
 Preferred by Worcester. "tailage }
 Preferred by the Century Dic- talliage }" with a very short
 tionary. definition. It also gives
 Approved by the Standard Dic- "tallage }
 tionary. talliage }" with a longer and
 more elaborate definition—
 and no cross-reference.

7740

TITBIT

TIDBIT

Preferred by Worcester. In Webster 1847 the form "tit-
 Preferred by the Century Dic- bit" is separately given and
 tionary. defined.
 Preferred by the Standard Dic-
 tionary.

7741

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WILFUL

WILLFUL

The only form in Worcester.

The less simple form.

Preferred by the Century Dictionary.

Preferred by the Standard Dictionary.

The simpler form.

7742

WOFUL

WOEFUL

“Illustrated”: “woful, also woeful.”

Webster 1847 gives

“woeful

The only form in Worcester.

woful }”; the less simple form.

Preferred by the Standard Dictionary.

Approved by the Century Dictionary.

The simpler form.

WOFULLY

WOEFULLY

7743

The only form in Worcester.

Webster 1847 gives

Preferred by the Standard Dictionary.

“woefully

Approved by the Century Dictionary.

wofully }”

The less simple form.

The simpler form.

ZAFFRE

ZAFFER

“Illustrated”: “zaffre, also zaffer.”

Preferred by Worcester.

Approved by the Century Dictionary.

Approved by the Standard Dictionary.

7744

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7745

May I correct that error in Mr. Carroll's statement, an error which came from Mr. Mawson's testimony? Mr. Mawson professed to present a list of seventy-five words in which the New Webster or rather say the Webster's New Illustrated had retained the so-called English or British spelling. Mr. Mawson's count in that list was incorrect. There were seventy-four words instead of seventy-five.

Q. 14. I notice that you have characterized the form "Abettor" as a hybrid form, a Latin termination on an Anglo-Saxon base. What do you mean by that? A. I mean—well, take the usual legal form "Aider and Abettor." Now, "aider" has the form which is usually added, the suffix added to the English word, instead of "aidor". Now, in "abettor", abett is the Saxon. That is English, pure English, and they have given it in the Webster 1847 as "abettor", which is a Latin ending, a common error.

7746

7747

Q. 15. In this list appear the following words: Accoutre, accoutrements, aide-de-camp, gavotte, gramme, joust, kilogramme, rencontre, which you have characterized as "the proper French form." What do you mean by that? A. I mean that the spelling is the spelling of the French, and the words are pure French. Webster gives the pronunciation as French, in French fashion. For instance, he does not give for aide-de-camp, "aid-de-camp," but "aide-de-kong," and therefore he should have made his spelling consistent with his pronunciation. And it is so with the others, and any editor has the right in a case of a French word, if it is stated in the preface as in the New International Dictionary, to use his own judgment as to whether a foreign word has become thor-

7748

7749

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oughly naturalized or not. A great many French words are in use, and some of them have taken on English pronunciation, and English spelling, while others have not. Those that have been read here are on the broader line.

7750

Q. 16. The following words appear in this list spelled in defendants' dictionary in the following way: Appal, distil, instil, skilful, wilful, woful, wofully. You have noted under these forms that they are a more simple form than that given in Webster's. Why do you make this distinction, and what bearing has it on the case?

MR. HALE: Objected to as irrelevant and immaterial.

7751

A. Webster says that the first principle of his orthography is that he should have the simpler form; where he neglects to make the form simple or rather to adopt a form that is in use that is simpler than the one he puts down, he is inconsistent. The New Illustrated Dictionary is following out Webster's theoretical view when it spells words like "skillful" and "woeful" and "willful" and so forth with one "l" in the middle and "woful" and "wofully" without the "e" by saving a letter in each case, in each of the cases, or rather in each of the words that were read by Mr. Carroll.

7752

Q. 17. The following words are given in the following form by Webster's New Illustrated: "Chartographer, deflower, detector." You have designated these forms as etymologically correct, and the Webster form as etymologically incorrect. Will you kindly explain briefly the etymology of each of these words?

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7753

MR. HALE: Objected to as irrelevant and immaterial.

A. The first, chartographer,—that is derived not as Webster supposed from the Latin, but from the Greek, that is, “c h” and not plain “c” plus the Greek “graph”; therefore Webster’s New Illustrated is in accordance with the proper etymology, because it comes out of the Greek and not out of the Latin.

7754

Deflower: As to that, etymology is rather the usage of all persons. I have never seen it spelled “flour” but “flower.” It is to “de”—that is from or away from; “flour” which is properly “flower”—that is really as much a matter of usage as it is of etymology.

Detector: That as Webster has it is spelled “detector,” which is under the same head as “abettor,” and is a bastard—or it is a hybrid word, because “detect”—that part of it is Latin, and the “or” is a Latin ending. Webster has taken a Latin first, and added to it an English ending, “er”, and which is just opposite to that in abetter “abettor.”

7755

Q. 18. Mr. Mawson stated in answer to question 115, that the seventy-four or seventy-five words given by him constituted forty percent of all the words which have a possible two spellings, one English and one American. What is the total number of words in the English language with two spellings, one English and one American?

7756

MR. HALE: Objected to as being a wholly incorrect statement of what Mr. Mawson testified to.

7757

Prof. Harry Thurston Peck—Direct.

7758

A. Why, according to Webster's International—not new International, but the International, the words that may be spelled in two different ways, or even three different ways number 2,996, and really more than that, because he omits those which it is understood that he differs about; that is, those in “our” words given “or”, and the double “l” as in such words as “traveler” and several others; “er” instead of “re” for words as “saber” and “meter” and so forth. I do not vouch for the accuracy of that. I do not give it as my opinion. I say that is stated in Webster's International.

7759

MR. HALE: The answer of the witness is objected to as incompetent, being a mere quotation from a printed book as to which the witness has disclaimed any knowledge, and a motion is made to strike it out as not evidence.

Q. 19. At question 116 the witness Mawson pointed out some mistakes in the defendants' book. Did you find in the Webster 1847 any instances which might be said to sanction the inclusion of mistakes in dictionaries? A. I did.

7760

Q. 20. Can you give some, please? A. They are of a varied character. For example, under the head of “aeolian harp”— in the first place he spells it in two different ways. Now, aeolian harp is spelled “aeolian harp.” He gives it there, and refers—cross reference—see “eolian harp.” There is no such title in the book as “eolian harp.” That would be one instance. They are of all sorts, and came to me as I was going through the book without that particular purpose in view. Then I am going to read to you a list of certain errors that

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7761

are not easily classified that I found in Webster's dictionary of 1847. The list is as follows:

"MISCELLANEOUS ERRORS

in Webster's dictionary of 1847, which do not fall under any other general category.

ABNORMITY is out of place, preceding ABNORMAL. ACQUISITIVE is defined, but described as "improper."

7762

AMIDSHIPS is defined but its part of speech not given.

BANK-BOOK is entered out of place, preceding BANK-BILL.

CALENDS cited by Webster along with CALENDAE as representing proper Latin forms.

DEAR is defined as HATEFUL.

DESS a form given by Webster as equivalent to DESK.

DRANK defined as "a term for wild oats."

7763

LACK is given as a spelling for the East Indian LAC.

LAMA is incorrectly defined as "the god of the Asiatic Tartars."

PALEOZOIC a word that is given without any definition.

RANG "nearly obsolete," according to Webster.

VANILLA a word noted as an adjective but defined as a noun.

WIERD "not in use," according to Webster.

7764

WITTICISM characterized by Webster as "an archaic word."

YEAR, in defining this word, Webster makes the sun move around the earth.

ZINCODE is defined by Webster as "the positive pole of a galvanic battery."

7765

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These do not fall under any particular head. They are mistakes of different sorts, either where the definition is omitted in a word, or a cross reference is wrong, and where a word is out of place, or where they are obviously absurd.

Q. 21. What is the mistake in the definition of the word "zincode?" A. Oh, it says the positive pole. It should be the negative pole.

7766

Q. 22. At question 118 the witness Mawson gave an example of what he designated as definitions in defendants' books with a British character. Did you find any instances in the Webster 1847 of similar definitions of a British character?

7767

MR. HALE: This question, and this whole line of questions, is objected to as incompetent, irrelevant and immaterial, as not in rebuttal of anything testified to by Mr. Mawson, and it is stipulated that this objection may apply to all questions upon this line without being specifically renewed to each question.

7768

A. I find, a very large number of definitions, in the first place, of titles that were British rather than American; under them I found that as a rule Webster 1847, or at least the Webster book of 1847 treats largely the British phases of almost everything under this head, sometimes not mentioning this country at all, giving definitions fully that relate to feudal years and usages that cannot possibly prevail in this country, and never did, and yet says nothing to show that he is defining a British word, or that he has in mind a British usage. He uses such expressions, for example, a sack, 36 stone. Now, Americans do not

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7769

express their weights in stones, and this is another instance of Briticisms that come out in all sorts of ways. Jail—he spells it the British “gaol.” He spells it “silvan;” that is to say, he gives the title “silvan” which is one of one of his own variety of spellings, in the title, and defines it there, but when he comes to use the word “sylvan” in other titles, as for example, the title “woody” he spells the word “sylvan” which is British. In such words as admiral, navy, fleet,—I take these as particular notice of that—navy and fleet. In admiral—there the article is almost entirely British. For example, under the word “admiral” he begins with the “Lord High Admiral in England, Great Britain.” We at that time had no admirals in our navy, but it is strange that he did not even negatively state that fact. It is an entirely British article. Take for example such a word as “commoner.” In the remarks he does not say anything about England, but he says simply “one of the lower rank or common people, one under the degree of nobility,” as though he were writing for this country. He says also “A member of the House of Commons, a student of the second rank in the University of Oxford, England.” There he mentions England, but in the other definitions he leads you to infer that in this country we have nobility and House of Commons, and so forth. “Inn” he says “House for lodging and entertainment of travelers.” That is very well. “In England a College of Common Law of professors and students and so forth.” In his “Inns of Chancery,”—there he does not say in England—“College in which young students formerly began their law studies. These are now occupied chiefly by attorneys, solicitors and so forth.” Now, of

7770

7771

7772

7773

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course, any intelligent reader would know at once that that was an English definition, but he is careful, or at least he wants to show "In England" with reference to the College of Law Professors, but in "Inns of Chancery," he lets us think we have Inns of Chancery and solicitors and probably barristers.

7774

MR. HALE: I object to the witness' statements beginning "he lets us think" as being a mere conclusion; the witness should confine his testimony to pointing out what appears in the books.

7775

THE WITNESS: Now, for example, here is the noun "turbary," which is marked as a noun. He says, "in law, the right of digging turf on another man's land." 2. Turbary,—"the liberty which a tenant enjoys of digging turf on his Lord's lands." Here is nothing to show that that is an English word in the first place. Now, here is a sort of a thing that is very common. "Navy," a noun.

"The whole of the ships of war belonging to a nation or king. The Navy of Great Britain is the defense of the kingdom, and its commerce." Nothing about our Navy.

7776

"Commonalty, the common people in Great Britain"—there he mentions Great Britain, "All classes and conditions of people who are below the rank of nobility." Now, I have a long list here of Briticisms without the definitions written out. It is a list of words, where the definitions are given in the Webster 1847 in a British form, and as written for Britain, and as a rule

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7777

with nothing to show that they are written for English readers, and apparently as representing conditions and usages in the United States, whereas they are not. The list is as follows:

BRITICISMS IN WEBSTER 1847.

ACRE	BANGING	
ACTOR 3.	BANKRUPT	7778
ADVOWSON	BANOY	
BAILIFF	BARBERRY	
BALLIAGE, or more correctly Bailage.	BARQUE	
BAND—BAND OF PEN- SIONERS in England.	BARON	
BARROW	GRACE a—Title b—Act (English Universities.)	7779
BARSE	INQUEST	
BASALT	LADY	
BROACH	LANDLORD	
DEGRADATION	LANE	
DELEGATE	LARCENY	
DEMISE	OCTILLION (no reference to American usage).	
DEMY	OCTOBER	
DENIZEN	OCTENNIALLY	
DEODAND	PARISH	7780
DEPONENT	PARISH-CLERK	
DISCLAIM (of tenant and lord)	QUAD ("evil, bad").	
ESQUIRE	QUADRILLION (no Amer- ican definition).	
ESSOIN	QUARTETTE	
ESTATE	QUARTET	

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QUICKSET

GALLON

GAOL (notice the spelling)

GENTLEMAN-COMMONER

GENTLEMAN-PENSIONERS

GENTRY

GEST

QUINTET

QUINTILLION

RECOGNIZANCE

RECUSANT

SACK ("twenty-six stone").

WHIFFLER

WOODMAN

WORSHIP

7782

GLASS-COACH

GOD-FATHER

Q. 23. What comment has Worcester made on errors?

MR. HALE: Objected to, unless the copy of Worcester is produced.

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A. This last paragraph of Dr. Joseph E. Worcester's preface to the dictionary of the English language, Boston, 1860—

MR. HALE: The question is further objected to as incompetent, irrelevant and immaterial, and as merely an unsworn declaration contained in a printed book, in no way binding upon the complainant.

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A. (Continued) "It will be apparent to any one who may examine this Dictionary, that a great deal of labor has been bestowed upon it in order to bring it to its present state; and it is believed that it will carry with it evidence of much pains having been taken to make it both correct and useful; but no amount of labour, research and care can render such a work free from errors and defects. The best authorities that can be had, differ

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in many cases from each other; and they will sometimes inevitably lead astray."

Q. 24. In questions 122 and 123, the witness Mawson gives a list of words in defendant's dictionary which refer to other words by cross reference. These are cases where the word referred to does not itself appear in the defendant's book. Could you find any such statements in the Webster 1847?

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MR. HALE: Objected to as irrelevant and immaterial.

A. I think there are some in that list which is already on the record, as miscellaneous errors.

Q. 25. Aeolian harp is one, already given? A. Is one, yes. "Kaffir" is the title under which he gives it, and he says, "See Caffer". When you reach "Caffer" there is no such title there. A certain amount of research will enable you to find "Caffre" which is contrary to Webster's own kind of spelling, and he has missed his cross reference.

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MR. HALE: I object to anything the witness does not point out.

THE WITNESS: For example: "Fancier" which of course means a bird fancier, or animal breeder. He says, "One who fancies". Nobody would know that that meant anything except a fanciful person, but he says, "See Fancy".. Under "Fancy" there is no reference to the occupation of a fancier. Secondly, that is a cross reference that does not cross refer, and no one would know from its original one. There are a large number of words in the

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matter of cross references, where Webster, or those who acted for him, where Webster violates his own principle. The principle of cross reference, which Webster sets forth, is that words of different spelling and meaning, or words of different spelling which are pretty nearly equal in value, and his preference is only a personal preference, should be either bracketted together, as for example, he had sarsaparilla and zarsaparilla bracketted together to show it is an "s" or "z", but he thinks it is "s", and then that should always be the case, and you should not have the other. Mr. Mawson says you should never have this kind of a thing. "Purr", "See Pur", but you should have "pur" which is the preferred form, and "purr" with a sort of brace running around it. Now, there are a great many instances of Webster 1847 dictionary, where he takes a word, defines it, and then refers you to the other form somewhere else in the book, or may be only a few lines off, and not always in accordance with his own orthography. For example, he has "saber" and right under it, with a brace "sabre". That is in accordance with his system, and he defines it, but over in the back of the book, or a little further on, he says "sabre", "See Saber", that is to say he has rather heaped up the matter of cross reference. I find the same thing in "Purr". He defines the word under one form, and he cross refers at the same time, so you don't know which is the preferred form. Now, as to—

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MR. CARROLL: I think we have enough.

MR. HALE: I object to the interruption of the witness' answer by counsel with the obvious result of closing his lips.

Q. 26. In witness Mawson's parallel column exhibits were included certain extracts from John Ogilvie's Imperial Dictionary. What is the origin of this book?

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MR. HALE: Objected to as incompetent, irrelevant and immaterial, because it does not appear that the witness knows the origin of the book referred to, and because the book is not in issue in this case; also as calling solely for the conclusion and opinion of this witness.

MR. CARROLL: The witness Mawson indicated certain indentities between defendant's dictionary and John Ogilvie's Imperial Dictionary, and offered these identities as evidences of origin in Ogilvie's dictionary, and it is the purpose of the testimony which is to follow to show that John Ogilvie's dictionary was in fact itself based on and taken from Webster's.

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MR. HALE: The counsel's statement does not correctly summarize the purpose or effect of the witness Mawson's testimony in the record as mentioned. Further, it appears that the witness Mawson at the time prepared and pointed out the identities between defendant's book and the Webster 1847 edition, and the similarities between defendants' book and the Ogilvie book referred to was in regard to matters in the

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Ogilvie book, and not in the Webster 1847. It is further objected to upon the ground that the proposed line of proof is inconsistent with the answer which alleges that defendants' book was based upon the 1847 book, and nowhere asserts that it was based upon the English John Ogilvie's dictionary; also upon the ground that it is shown that defendants' book is a substantial copy of the British Empire dictionary, and no connection whatever between the last named dictionary, and any other dictionary is shown.

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MR. CARROLL: The defendants are not attempting to prove that its dictionaries are based upon the Ogilvie dictionary or any other English dictionary, but are simply proving by this testimony which is to follow that similarities between defendant's dictionary and John Ogilvie's Imperial dictionary are not inconsistent with a basis in or derivation from Webster's dictionary, inasmuch as the John Ogilvie book itself is based upon and derived from Webster.

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A. I should say that my knowledge of the origin of this book is derived from that very authoritative work known as the "Dictionary of National Biography," edited by Sir Leslie Stephen, in conjunction with Mr. Sidney Lee, both gentlemen being of very high rank in the field of letters.

MR. HALE: Objection and protest is made against the witness detailing matters which he has read in the books named, as

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incompetent, irrelevant, and wholly immaterial, and no proof whatever of the facts recited.

MR. CARROLL: As the facts belong to the past about which there can be no living witnesses brought to testify, the best evidence is that to be found in authoritative and scientific histories. This evidence is offered on that basis.

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MR. HALE: This is not a question of science or anything of that nature. It is a pure question of fact.

THE WITNESS: May I state that the notice of Ogilvie, which was prepared by Sir Leslie Stephen and Mr. Lee, was itself based upon a memoriam, written immediately after the death of Ogilvie, and is not to be had in this country at all, but prepared by a townsman, and intimate friend of Ogilvie's, and is in all the British—all the large British libraries. They did not go about at large getting their information, but they went right to the man who knew Ogilvie best, and knew the facts of his life the best.

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MR. HALE: The last preceding statement of the witness is objected to as obviously not evidence, but pure hearsay or surmise.

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Q. 27. What does the article in Sir Leslie Stephen's book say about the origin of this dictionary?

MR. HALE: Objected to upon all the grounds stated.

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A. It says that—may I read from my notes?

MR. CARROLL: Yes.

THE WITNESS: I read from Sir Leslie Stephen's—

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MR. HALE: Why don't you produce the books? I object to the witness reading a statement without producing the books from which he reads, so that the whole statement may be seen, and not only selected portions of it.

THE WITNESS: I am reading all there is to it.

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Q. 28. Now, please answer, Dr. Peck, giving precisely where the book is, and the page upon which this appears, and the reason why you have not produced it? A. Well, first of all, the book can be had in the Public Library on 40th Street, in the General Reading Room; as you go into the General Reading Room, it is in the left hand—northwesterly corner, occupying three large shelves, and there is the book from which I extracted all that had to do with this literary work; what had to do with his marriage or his children and so forth, I omitted. The rest I have here verbatim, and I could easily—the reason I haven't it here, is that those books are not allowed to go out of the library. I could take witnesses with me, and could swear to the accuracy of it, before a Notary Public, if necessary.

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MR. HALE: The objection is renewed.

THE WITNESS: I have not answered the whole question. And it is in the ninth volume, and on page 21.

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MR. HALE: The objection is renewed upon the further ground that it is incompetent for the witness to give his own selection of matter from the book stated without producing the book so that complainant may see for itself what, if anything, is relevant.

THE WITNESS: I will take nothing but what refers to Mr. Ogilvie—you don't want anything about his birth or grandmothers or anything of that sort.

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"John Ogilvie in 1818 had an accident by which one of his legs had to be amputated above the knee. After that he taught, and in 1826 he made for Blackie & Sons an annotated edition of Stackhouse's History of the Bible. Messrs. Blackie engaged him in 1838 to prepare an English Webster's English dictionary." That is a curious thing, an English Webster's English dictionary,— "the result being the Imperial Dictionary of the English language, and it appeared in parts from 1847 onward and was published complete in 1850, and supplemented in 1855." In 1863 Ogilvie issued an abridgement of the dictionary under this title, "Comprehensive English dictionary, explanatory, pronouncing and etymologizing," credit being given to Mr. Richard Cole. In 1865 appeared the Student's English Dictionary, Etymological, Pronunciatory, and in which etymology and definition received special attention. Ogilvie's last work was a condensation of the Student's dictionary, 1867. At his death, he was revising the Imperial dictionary, which was issued in 1882, 1883, under the editorship of Dr. Charles Ammandale. Ogilvie died in 1867.

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MR. HALE: The answer is objected to as wholly incompetent, irrelevant and immaterial, and a motion is made to strike it out.

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Q. 29. Have you got a copy of the Imperial dictionary of John Ogilvie, the first edition? A. (Indicating) This is the Imperial edition of John Ogilvie, which is the first edition, and it appears here in 1850, which is already stated. I have now in my hands the first volume of the Imperial dictionary, English, technological and scientific.

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MR. CARROLL: I offer this book in evidence.

MR. HALE: Objected to as incompetent, irrelevant and immaterial, and because no connection is asserted between defendant's dictionary and this book, and because inconsistent with the affirmation of the answer, and with the previous testimony of this witness that the defendant's book was based directly upon the 1847 edition of the Webster's dictionary.

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MR. CARROLL: Subject to that objection, the dictionary is received in evidence, in two volumes, and upon the title page of the dictionary it is designated as "Imperial dictionary, English, Technological and Scientific, adapted to the present state of literature, science and art, on the basis of Webster's English dictionary."

MR. HALE: Read the rest of it.

MR. CARROLL: You can do that.

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MR. HALE: The partial quotation from the title page is objected to because it omits the material language which is as follows: immediately following the words quoted:

"With the addition of many thousand words and phrases from the other standard dictionaries and encyclopedias, and from numerous other sources, comprising all words purely English and the principal and

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most generally used technical and scientific terms, together with their etymology and their pronunciation, according to the best authorities. Edited by John Ogilvie, L. L. D."

MR. CARROLL: At page 2 of the preface is found the following language:

"Webster's dictionary which forms the basis of the present work is acknowledged both in this country and in America to be not only superior to either of the two former, but to every other dictionary hitherto published."

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MR. HALE: Complainant objects to the statement read by counsel from the preface upon the ground that the same is incompetent, irrelevant and immaterial, and not evidence, and because defendant's book is in no way connected with the Ogilvie dictionary, from which counsel read.

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Q. 30. Is the Annandale dictionary based on this dictionary?

MR. HALE: Objected to as incompetent, irrelevant and immaterial, and as calling for facts not shown to be within the knowledge of the witness, and as calling for a conclusion and opinion of the witness.

A. Yes, the Annandale book is an enlargement of the original Ogilvie.

7820

Q. 31. In the witness Mawson's testimony he allowed forty-five per cent of identity between the Webster 1847 and Defendants' book. Is that the correct amount of identity between the two books?

MR. HALE: Objected to as calling for a conclusion, unless the witness will produce

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the data upon which his answer is based, comparing the two books.

A. No, it is not.

Q. 32. What is the correct amount?

MR. HALE: Same objection repeated.

A. 67.6 per cent.

7822 Q. 33. Upon what do you base this statement? A. Upon personal count of two hundred pages, personal comparison of two hundred pages of the Webster's New Illustrated, and part taken from every letter of the book with the corresponding pages of the Webster's 1847, and the comparison indicated a total in percentages.

Q. 34. Have you marked the identities? A. I have marked the absolute identities; I have marked the practical identities; and I have marked the paraphrases, using great distinction in the last.

7823 Q. 35. Will you please produce the copy of Webster's New Illustrated Dictionary in which you have made these markings, and also the copy of Webster's 1847 in which you have made the markings? A. This is the copy of Webster's New Illustrated in which the markings have been made, I can read you, if you like,—

MR. HALE: The books will speak for themselves.

7824 THE WITNESS: This is the Webster 1847 which has been marked.

MR. HALE: Have you indicated any pages that were marked?

THE WITNESS: Yes, I have a complete list of the pages that were marked. For instance, in the letter A there were thirty pages. The first number, two hundred, was

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taken for the New Illustrated Dictionary. That represents something over three hundred pages in the 1847 Webster. The titles in the Syndicate book were 6,932, and the Webster titles were 5,651. This, however, is what you would like to see.

(Handing papers to Mr. Hale.)

I have also a special thing, and this is a printed form—

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Q. 36. Please describe it? A. This is a printed form in which I have arranged these words in groups of five pages each for convenience, and with convenient numbers. They are numbered, each group, 1, 2, 3, 4 and 5. They are sub-divided by a vertical line through the middle, so that each column is counted, and the words in each column were counted, first of all, under the words of the column; secondly, words marked in red which denotes absolute identity; thirdly, words marked in blue which denotes practical identity, and fourth, words marked in black, if such there be, which denotes paraphrases; that is to say, where a fairly long passage in Webster's has been condensed and paraphrased in the other Webster. Then I have in the next, I won't say directly, a number of titles in Webster—at least a number of titles that are not in Webster's, but that are in the Webster's New Illustrated. I ought to say that the basis of this is on both titles which appear in the Webster's New Illustrated, and which appear in Webster. If the title appears in Webster, and it is not in the Webster's New Illustrated, why, that is not taken into account. Words that are in the New Illustrated, however, and that are not in Webster are taken into account, merely by way of information, but they are not counted, in words

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under those titles. Now, with that explanation, and at the end of each group of five, there is a percentage of Webster's five pages of 56 or 61, and so on, and the whole total is given on the last page, percentage of Webster in 200 pages, 67.6, so it is very easy for you to test it in any place as to the number of words in a column, as to the number of Webster words in a column and as to the number of words or definitions that are merely Webster, and certainly Websterian, and those that obviously come from Webster.

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Q. 37. Have you also written at the bottom of each column, marked in the New Illustrated, the percentage for that column itself? A. That column itself.

Q. 38. So that even without reference to this last tabulation it is possible to go directly to the book itself and find at the foot of each column the exact count for that column? A. Yes.

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MR. HALE: In which book is that?

THE WITNESS: For example, just look at this a moment: Of course, there is marked the percentages in Webster; that is a convenient form. The outside of the book explains it. (Indicating Webster's New Illustrated Dictionary.) You will see that certain titles are marked in red, and every title that is underscored, the title merely, that is marked and underscored in red, that means that the title is both in this book and in the Webster book. Now, if you find a title—and many titles are not underlined at all—you will find that nothing is underlined, because they are in Webster and not in this book. That is all explained on the outside.

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Q. 39. In your examination and marking of these books, what in general did you discover about definitions of technical or scientific terms?

A. I found that with regard to technical and scientific terms that there were—that the original Webster definition had been somewhat modified, owing to the fact that the sciences have changed and been modified since then, and that sometimes there would be added another line in order to bring the subject up to the present state of knowledge. When such a thing occurred, as Webster could not have known it, and in fact, as Webster anyway did not have it in his books, those were bracketted as not being in Webster, and as not being possible to be in Webster, but mainly because they were not in Webster.

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Q. 40. Were the definitions of scientific terms in the Webster 1847 in most instances what you would term ideal definitions?

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MR. HALE: Objected to as irrelevant, immaterial and as leading.

A. No.

Q. 41. Why not? A. Because it seemed it was perfectly certain that Webster himself was not a scientific man, and he blundered, and made definitions that hardly defined. If you go from his book to this book, for example, you will find a great difference in scientific and technical definitions, and in the Webster's New Illustrated they are much better than the Webster 1847.

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MR. CARROLL: The Webster's New Illustrated Dictionary is received and marked in evidence as the witness Peck's Webster's New Illustrated Exhibit, and the copy of

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Webster's edition of 1847 is received in evidence and marked in evidence as Defendant's Exhibit Webster 1847 with Peck's markings, and the summary of percentages, appearing upon twenty-five form pages, is also offered in evidence and received in evidence and marked in evidence as Defendant's Exhibit Explanatory of Peck's Percentages.

7838

CROSS EXAMINATION by Mr. Hale:

x Q. 42. Dr. Peck, did you personally mark the two exhibit volumes, Webster's 1847 edition, and Webster's New Illustrated dictionary, which have just been offered in evidence? A. I did.

x Q. 43. Did all the work yourself? A. Yes, in the way of marking, yes; I had sometimes a reader to go over and verify things that I have done.

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x Q. 44. And you had fully compared and saw in the two books the matters which you marked? A. Yes, for the matter in the two books which I marked.

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x Q. 45. You have marked what you term "paraphrased matter." Do you in your testimony to-day, with reference to these marked exhibits, use the term "paraphrase" in the same sense as you defined and explained it in your testimony upon the former occasion? A. I presume so, because there is just one definition for paraphrasing, and that is the restating or another stating of the same fact or facts in the nature also of a condensation.

x Q. 46. Is the term "paraphrase" as applied to these two exhibit volumes to be understood in the same sense as the term "paraphrase" was used by you in connection with Defendant's Ex-

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hibit C, which was offered upon your previous examination? A. I presume so. Mr. Mawson has used the word in different senses.

x Q. 47. Never mind how Mr. Mawson used it. We want to undersand your testimony. How did you use it? A. That is the way I used it.

x Q. 48. So it means the same in these exhibits as it does in your other exhibits? A. Other exhibits, yes.

x Q. 49. In stating these percentages, which you have stated in your table, and at the foot of the pages in the Exhibit Volume, Webster's New Illustrated Dictionary, you counted all the words underlined in red? A. Yes.

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x Q. 50. And also all the words underlined in blue? A. Yes.

x Q. 51. And the number of words underlined both in red and blue was the figure you took to calculate your percentage? A. No.

x Q. 52. Is that correct? A. Those underlined in black also.

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x Q. 53. You included those? A. Yes.

x Q. 54. In ascertaining the percentage? A. Yes. They represent a very small revision of large Websterian quotations, in other words, a paraphrase.

x Q. 55. For example, on page 76, beginning with the letter B in the Exhibit Volume, Webster's New Illustrated Dictionary marked by you, at the foot of the first column I find the figures, 63 per cent. Just precisely what does that mean? A. It means the taking as a basis of one hundred per cent. all the titles in Webster—all the titles that were common to this book, and the Webster book; that representing the basis of one hundred per cent. I added up the words that were in red, blue and black, and made a percentage on that

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basis they were so much of the total number of words in the column.

x Q. 56. In other words, does this 63 per cent. which appears at the place specified, mean that the words underscored in that column—A. Represents 63 per cent. of the column, and they are Websterian words.

7846

x Q. 57. You do not mean that 63 per cent. of the entire column in defendant's dictionary can be found in Webster's 1847? A. Yes, except where—no, they are absolute identities; they are absolute and practical identities, and there are paraphrases, 63, and are such as any impartial person would say came from Webster or were in Webster.

7847

x Q. 58. Confining our attention to this first column under the letter B, on page 76 of this exhibit volume, do you mean to say that the words underscored in that column comprise 63 per cent. of all the matter in that column? A. No, only 63 per cent. of the Webster part of the column.

x Q. 59. Just what do you mean by that? A. I mean of the part of the column which might have been in Webster; that means that 63 per cent. was in Webster.

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x Q. 59. 63 per cent. of the entire column? A. Not of the entire column, but of so much of the column as you will find in Webster—at least you will find the titles in Webster, and where he might have had these particular words.

MR. CARROLL: In computing the percentage which appears at the foot of each column, Dr. Peck took as his 100 per cent. the total number of words used in defining the titles which were given both in defendant's

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dictionary and in the Webster 1847. Words used in defining titles which did not appear in the Webster 1847 were not included in the 100 per cent., upon which the percentage noted at the bottom is computed.

x Q. 60. Is that what you mean, doctor? A. What I mean. Absolutely.

x Q. 61. You do not mean that the 63 per cent. for example, then, is the 63 per cent. of Webster's dictionary carried forward into defendants' dictionary? A. It is 63 per cent. of so much of Webster's dictionary as was carried forward into the defendants' dictionary. It represents 63 per cent. of the possible 100 per cent. which might have been carried forward from Webster's dictionary.

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x Q. 62. What percentage of defendants' entire book upon your own theory of marking might have been taken from Webster's 1847 edition? A. 67.6 per cent.

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x Q. 63. Of the entire book? A. Well, no; I am basing that on an examination of two hundred pages, in comparison of some two hundred pages of this book with what corresponds in Webster's, as beginning with the Webster title and ending with the Webster title. You will see that these run by even pages, to make it so much more definite.

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x Q. 64. But on that basis— A. Yes.

x Q. 65. (Continued) Do you arrive at the conclusion— A. Yes.

x Q. 66-67. (Continued) Did you arrive at the conclusion 67.6 per cent. of all the matter in defendants' book might have been derived either

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by copying, paraphrasing or abridging from Webster's dictionary of 1847? A. Yes.

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x Q. 68. That includes words in defendants' book which do not appear in the 1847, is that correct, or do you exclude those from your 100 per cent.? A. That has nothing to do with the 100, there may be words that are so closely similar. Now, if you will let me give you an example—suppose the word "helmet" is defined in one book as "a knight's head covering," and the other has "the head covering of a knight." I should mark that red—I beg your pardon, I should mark that blue, because that has a change, but if each takes "the head covering of the knight," that would be red, but if there is a change or a little change like that, I say that is out of Webster.

7855

x Q. 69. Assuming this matter entirely clear, please look at the first column of page 77 of your marked exhibit. In that column I find fourteen terms defined. Of these fourteen terms five of them are underscored in red, indicating according to your testimony that those same terms are found in Webster 1847? A. Yes, exactly.

7856

x Q. 70. At the foot of that page you have the figures, 66 per cent. What I want to know now is whether that 66 per cent. means 66 per cent. of all the matter appearing under the fourteen terms, or whether only the matter appearing under the five marked terms? A. It is 66 per cent. of the matter appearing under the terms—the titles marked in red.

x Q. 71. And the other nine terms which are defined in that column do not enter into your computation at all, is that correct? A. The other nine that are defined and not marked in any way—they do not enter into my computation at all.

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x Q. 72. Then 67.6 per cent. does not mean that 67.6 per cent. of all the matter in defendants' book— A. 66 per cent.—

x Q. 73. (Continued) Of all the matter in defendants' book was or might have been taken from the 1847 edition of Webster? A. Well, it represents, so far as you can represent a thing by averaging, it represents the average result which you get from making this close comparison with two hundred pages of this book.

7858

MR. CARROLL: The 67.6 per cent. represents that portion of matter which is defined in Webster and also defined in exactly or nearly exactly the same way in this book.

x Q. 74. In giving your percentage of the whole, which you stated was 67.6 per cent., did you add the percentages which appear at the bottom of the columns in the marked volume exhibit before you and average them? A. Yes.

7859

x Q. 75. So that whatever the markings in the first column on page 77, for example, mean or show, would apply to all the other columns? A. Yes.

x Q. 76. With the exception of a difference in the count? A. Yes.

x Q. 77. It is not true then that 67.6 per cent. of this entire volume is marked to indicate what in your opinion is copied or paraphrased from Webster's 1847? A. Of the entire volume, no.

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x Q. 78. Or even of the two hundred pages, which you marked? A. Oh, yes.

x Q. 79. Do you mean to say that the markings upon this volume for two hundred pages are ap-

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proximately 67.6 per cent. of all the matter contained upon those two hundred pages? A. The Webster matter, all the titles—

x Q. 80. I am talking about all the matter on those pages; is that true or is it not true? A. Upon all the matter which formed the 100 per cent. on these columns.

7862

x Q. 81. Have you underscored 67.6 per cent. of all the words that appear upon the two hundred portions of? A. I underscored all the words that I did—

MR. CARROLL: No is the answer to that.

THE WITNESS: I did not underscore—

MR. HALE: Let him explain it.

THE WITNESS: No, but we want to be fair about this. Now, you understand, Mr. Hale, that what I was marking was titles.

7863

MR. CARROLL: What is the question on the record?

MR. HALE: I object to the interruption of the witness.

(Last question repeated by the stenographer).

MR. CARROLL: Please answer that yes or no, doctor.

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MR. HALE: I object to counsel assuming control of the witness while under cross examination.

THE WITNESS: No, I do not want to follow Mr. Carroll or anything but my own analysis of the thing. I am trying to make it clear to you, that all the pages that I marked, the two hundred pages, were not all marked, but all the parts which belonged—which had Webster titles—where we

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had titles identical with those of Webster, were marked. If Webster did not have a certain title or if we did not have a certain title that he had, that was not marked; that is, the words under it were not marked, could not be very well. We might have some words that he had not. We could not mark those on the basis of Webster, and I certainly could not mark Webster on the basis of ourselves, but I understood the question to be, did I mark—I thought it was rather odd—did I mark all words that were marked on those pages, and I said yes.

7866

x Q. 82. The question is, do the words which you marked in any way upon the two hundred pages constitute as much as approximately 67.6 per cent. of all the matter contained upon those pages? A. No; that represents 67.6 per cent. of what I regard as the Webster matter on those pages.

7867

x Q. 83. Then you do not mean to testify that 67.6 per cent. of defendants' entire volume was or might have been derived from Webster? A. Why, no; where the titles were not in Webster or were not in our book, it could not be.

x Q. 84. There is a considerable percentage of defendants' titles belonging to that class? A. I do not know; they are mostly.

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x Q. 85. What percentage? A. Well, I couldn't say. There are 1281 titles that are in the Syndicate book and not in Webster, if you put it that way.

x Q. 86. And how many words used in the definitions of defendants' twelve hundred and odd words—

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MR. CARROLL: That does not appear.

THE WITNESS: That does not appear in here.

x Q. 87. So you cannot state then the percentage of matter in defendants' book which could not have been derived from Webster? A. Could not have been derived from Webster, no.

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x Q. 88. You cannot state that? A. I cannot state that.

x Q. 89. Do you mean to testify that you found a considerable number of what you consider errors or incorrect statements in Webster 1847? A. Yes.

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x Q. 90. What is your opinion of the book, nevertheless, as a scholarly production? A. I consider that in its time it was a scholarly production; of course I don't know of any dictionary that isn't in some respects defective, but it is the work of a scholar, but I consider now, to-day, I would not have it or use it or think of using it; it is very archaic.

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x Q. 91. In your list of words headed "orthography," which you read into the record, you have referred to words of the class of "instil," "skilful" and other words, in which Webster used the double "l" whereas the other forms used only one "l," and in your comment upon that you said that Webster's was the less simple form? A. Yes.

x Q. 92. What was Webster's reason for using that form, if you know? A. Why, in many cases, as "instil" I fancy he had—well, thought he wished to preserve the double "l" from the Latin, in the original form.

x Q. 93. Do you recall what reason he gave in the preface explaining his orthography? A. No,

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I read over all that, about his orthography, but I do not remember anything about that now.

x Q. 94. You do remember that Webster did say something upon that subject? A. Yes, and upon—he went rather thoroughly and minutely into the questions of orthography.

x Q. 95. And he used the double “l” principle, did he? A. No one saw what seemed to be the principle; he set forth his reason, yes. The general principle—the leading principle was simplicity.

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x Q. 96. Did that have anything to do with his adoption of “er” or “or” in the termination of words, such as “abettor”? A. Apparently not, because he has not been consistent at all in that.

x Q. 97. Did not he refer to that in his statement of his principle of orthography? A. He did refer to it, but he did not carry it out.

x Q. 98. In other words, he established a principle that he did not follow? A. Yes. You never can tell whether he is going to say “er” or “or”. It is just the way he happened to feel. Sometimes I can discover his reason, as for example, in “abettor” he took that because the legal fraternity had taken it, and you will find the Century dictionary has taken that. “Abettor” is used properly only in legal language.

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x Q. 99. He was rather insistent upon the double “l”, however, was he not? A. Yes; the same as “re” and “er”.

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x Q. 100. And he placed that in part upon the ground of consistency and simplicity in spelling, did he not? A. Simplicity in spelling, yes.

x Q. 101. So that when the word was lengthened by the addition of another syllable, the spelling of the word in both forms would be consistent? A. Yes.

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x Q. 102. That was his principle? A. As I recall, yes, that was his principle, but he lost in simplicity, because sometimes you know that double "l" occurs in the middle of a word, and not at the end, and there I cannot see any reason for it.

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x Q. 103. One of the great distinctions or differences between Worcester's dictionary and Webster's dictionary was in the matter of spelling, was it not? A. No, I do not think that you can say that, except it was not such a great difference between the 1847 and the 1886 Worcester; there was a good deal of difference, but I do not say that is the principal feature.

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x Q. 104. Was it not characteristic that Worcester did not follow Webster in these spelling innovations which Webster sought to introduce? A. Yes, in many cases, and also in his definitions which were more exact than Webster's.

x Q. 105. I believe you have stated that you always preferred Worcester to Webster? A. I did.

x Q. 106. On this list of words headed "orthography" which you have produced, you frequently have the phrase under the words "approved by Worcester"? A. Yes.

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x Q. 107. Just what does that mean, and why did you introduce it in this list of words? A. That means that Worcester included it as a permissible form, and I could have read from the preface to your alleged book as to the comparative value of those first and second preferred forms.

MR. CARROLL: You can, if you want to; it is in evidence. He can look at that.

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x Q. 108. When in this list you say "preferred by the Century dictionary", or by the Standard dictionary, that means the same thing as where you say "preferred by Worcester"? A. Or by Webster or Worcester; there is only one in there, if it plays any part.

x Q. 109. And where you say "allowed" that merely means it is a permissible form of spelling, is that correct? A. That means they put that second, but here is where I should like—if I might read this little passage from your preface, or Dr. Harris' preface?

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MR. HALE: I object to that as needlessly extending the record. The only purpose of the question is to understand the witness' notations to the words.

THE WITNESS: I think it should be understood what "preferred" and "allowed" means.

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x Q. 110. It is unnecessary to read anything from books to state that. I am trying to find out what you mean by that, and you have already answered the question.

MR. CARROLL: The witness is attempting to read a statement in one of complainant's books, which exactly indicates what he meant by the preferred form.

THE WITNESS: It seems to be very sensible and right.

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MR. HALE: I have no objection to his reading it if he insists upon it, but complainant does not call for it, and is not bound by it.

THE WITNESS: May I read it?

MR. CARROLL: Yes, you may.

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THE WITNESS: He says, "Speaking of alternative spellings, the first spelling is the preferred form, and the second spelling an allowed form or second form. In all cases where two forms of spelling are recorded that one is placed first which is regarded by the editors as the preferred form. In many cases, however, the second form is so widely used as to be practically on an equality with the one given." In other words, one is preferred and the other is thought to be almost—at least in the editor's mind—practically as good.

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x Q. 111. Under some of these words, in your list headed "orthography," such as "distil" and "dulness" as spelled in the Webster 1847, you have the notation, "The less simple form." Do you mean that as a criticism of Webster's preferred form and spelling? A. Yes, I mean that he has not been consistent with his own principle. "Dullness," for example,—what is to be gained by the two "l's" in dullness? That would have no bearing upon the possible condemnation of another word.

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x Q. 112. You have spoken of Webster's error in spelling the word "abettor" instead of spelling it "a-b-e-t-t-e-r"? A. Yes.

x Q. 113. And have stated it was due to his mistake of etymology, is that correct? A. Yes; I consider it an etymological blunder.

x Q. 114. Was that at all common in Webster 1847? That sort of thing, of a hybrid? Words introduced in hybrid? A. Yes.

x Q. 115. Mistakes in spelling due to Webster's mistaken etymology; was that at all common? A.

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Well, mistakes are there; I don't know what they were due to.

x Q. 116. You have stated that Webster should have made the spelling of certain French words consistent with the pronunciation, did you not? A. I did not exactly—did I say that?

x Q. 117. Just what did you say on that subject? A. I said inasmuch as he had made the pronunciation consistent with the spelling of the French, that is, the French spelling, I think he should have left the French spelling, inasmuch as the French is in use. Now, if you spell it "aid-de-camp" most persons would say "aid-de-camp," but if you spell it "aide-de-camp," that at once shows it is the true French form, and most persons say "aid-de-kong," as Webster pronounces the word. Spelling it "aid-de-camp," it would not lead you to assume it was a French word.

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x Q. 118. In such words as "gramme," for example, which I assume is the correct French form— A. No, excuse me, Mr. Hale. One thing about this, I was not in any way attacking Mr. Mawson's spelling as a rule, but rather defending the propriety of the form which the New Illustrated had adopted with great difference. In other words, I say in most cases you will find the New Illustrated, in the latest Webster, the form in the latest Webster, and at least as an authorized and variant spelling, and so you will find it in most of the other Standard American dictionaries. I objected to have it described as essentially British when it is contained and approved by the three leading American dictionaries.

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x Q. 119. In such words as "gramme," for measure, which you stated is the correct French form of the word, and in which Webster gave the spelling "gram," was not Webster's spelling in accordance with his principle of a simplified spelling? A. Yes, it was, but I should say there were two usages, one the French form, and it is allowable, or you can use the Webster spelling, but I wish you would look up the "cotillion," for instance.

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x Q. 120. In this list under the word "ledger-line," as spelled in defendants' dictionary, you state that "this is the only form in Worcester." Just why do you make that statement, and what does it mean? A. It means that you cannot find "leger-line" in Worcester. "Ledger" is the only form that Worcester gives.

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x Q. 121. But defendants' dictionary was not based upon or following Worcester, was it? A. No, I am showing what Mr. Mawson brought up, that the distinctive American spelling is not fundamentally that of Webster, and that the value of the American dictionary's standing very often differs from that, and you should call it British, if it happens, and if they all agree, and the dictionaries agree with the New Illustrated, and that happens to be an English form, too.

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x Q. 121. In this particular instance of "iedger-line," defendants' dictionary conforms to Worcester, and does not conform to Webster 1847, isn't that correct? A. That is so, yes.

x Q. 122. And in other instances it conforms to the Century dictionary or Funk & Wagnalls' Standard dictionary, and not Webster's, is that correct? A. Yes, it is, for the reason that I gave. Mr. Mawson said the general American usage was that of those three dictionaries.

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7897

x Q. 123. You have spoken of the word "detector" as spelled in defendant's dictionary, and which is spelled, "detector" in Webster 1847 dictionary? A. Yes.

x Q. 124. And you have pronounced Webster's manner of spelling as etymologically incorrect? A. Yes, that is to say, that is a hybrid word.

x Q. 125. As a matter of fact, did not Webster explain his reasons for ending such words in "er" rather than "or," so as to have a whole class of words spelled alike? A. He said something of that sort, but he did not follow it up. 7898

x Q. 126. But that was his principle? A. That was his general principle, yes.

x Q. 127. Then defendants' book is more Websterian than Webster's, is that what you mean? A. I think so, yes, in some respects,—not in all respects. I think it is more intelligent than the Webster 1847. It is a better book.

x Q. 128. How did Professor Mahn's etymologies as prepared in 1864 compare with the etymology of Professor Sheldon of Harvard, about the year 1890? A. Why, Professor Sheldon of Harvard is as much in advance of Professor Mahn as Professor Mahn is in advance of Webster, because in 1864 that was before a general knowledge of Grimme's law had come about, before Verner's law had been discovered, and before the epoch making work of Brugmann had come on. Professor Sheldon and Professor Verner both worked on this last dictionary. They are ahead of the profession. Professor Mahn represented an intermediate stage; he represented, if it is of any interest,—he represented the old grammar, the old school of grammarians, of which the head was Professor Georg Curtius. 7899
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x Q. 129. Did you compare Ogilvie's English Imperial dictionary of 1850 with Webster's dictionary of 1847? A. I compared it in the sense of—not quite the sense that you mean, marking, or anything like that, but I read over a great deal of it, a great deal of it, one after the other, so many pages of one, and so many of the other, to get a general impression.

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x Q. 130. Was John Ogilvie anything of a scholar? A. He was not a finely educated scholar; he was a man of scholarly instincts.

x Q. 131. Of some reputation? A. That gave him his reputation, of course; he was a rustic person.

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x Q. 132. Did he make any contributions to the book which he published? A. Oh, undoubtedly, yes; he spent—according to their biographies of him, the only thing you can get to now, he used to make alterations to see whether he could improve definitions and things of that sort, but I do not think they represented—from reading the two books I think he did endeavor to make it more exactly scientific; I mean scientific in the sense of defining scientific terms with more clearness and precision than Webster did.

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x Q. 133. Substantially as you explained upon your previous examination, when you referred to this book? A. Yes. Well, I did to-day, I think—no, I did not to-day. I said to-day that this book—that the trouble in Webster in regards to scientific terms was that he was not—he did not seem to be very familiar with the subject, and he would go to a very long winded person like Professor Olmsted, and Professor Dana of Yale.

x Q. 134. Do you know what changes were made in the subsequent edition of Ogilvie's English Imperial Dictionary which came out about the

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year 1883,—was it not? A. You mean in the Annandale?

x Q. 135. No, the Ogilvie's Imperial Dictionary published in England, the later edition of it? A. Well, there was a later edition of it—you mean Annandale's?

x Q. 136. I mean the book published under the title of the Imperial Dictionary by Blackie? A. There were a good many changes in etymology, and there were also a good many more—it was made more encyclopedic.

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x Q. 137. There were considerable changes made in it, in other words? A. There were changes in addition, really, to definitions; they had then by that time found that there had been necessity of changes, in the advance of knowledge, and in the inventions, and so forth, which Webster had partly got the glimmerings of.

x Q. 138. Do you know whether or not the compiler of defendants' book ever saw a copy of John Ogilvie's dictionary? A. Well, the compiler of the defendants' book,—I don't know who he was.

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x Q. 139. Then you do not know whether or not he saw a copy of John Ogilvie's dictionary? A. No.

x Q. 140. Do you know the Rev. Mr. Davidson, whose name is upon the title of the British Empire dictionary? A. No, I do not know him.

x Q. 141. Ever hear of him? A. No.

x Q. 142. He has no reputation as a lexicographer? A. Well, I would not say that, but I don't know him.

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x Q. 143. Not to your knowledge? A. Not to my knowledge, no.

x Q. 144. You do not know from what sources he compiled his book then? A. Not at all, no.

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x Q. 145. Is it your idea that if the title page and covers were ripped off of John Ogilvie's dictionary, it could be published in this country to-day and be properly called a Webster's dictionary? A. I would say yes.

x Q. 146. You would think that would be quite proper? A. Yes.

x Q. 147. Did you actually count all the words defined in defendant's dictionary, that is, the titles? A. No.

7910 x Q. 148. You do not know then whether or not Mr. Mawson's count as contained in the table which he read in evidence and which appears on page 517 of the printed record of complainant's printed case, is or is not correct? A. I do not.

x Q. 149. And you are not prepared to testify upon that subject? A. No, I have no knowledge of it.

7911 x Q. 150. Did I understand you to say that Webster 1847 spells jail "gaol"? Is that his preferred form? A. Well, yes.

x Q. 151. Under which head does he define it? A. He defines it under "gaol," and he defines it much more briefly under "jail."

7912 x Q. 152. Any cross reference between the two words? A. Why, under "gaol" he enters the remark, after defining it, and has the pronunciation "gole," and crosses that with "gaol," a different word. It would be convenient to write this word uniformly "jail," but he defines it to the extent of two lines, whereas "jail" he does not make a reference to, but under "jail" he has had a sort of change of heart, and where previously he has "jail," only a case, a crib,—he has practically the same definition, and he says, "Sometimes written very improperly "gaol" and is improper-

ly pronounced "gole." In other words, he uses both forms, but under the "gaol" he defines it, and gives it his part of speech, and certain other derivatives, from it, like "jail-bird" and so forth, and that is what I say when I say his cross reference system is not good; they ought better to have been together. "Jail" which he prefers and "gaol."

x Q. 153. You have spoken of certain definitions in Webster 1847 which you designated as British in form and substance, is that correct? A. Yes.

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x Q. 154. In many of those instances was not the word so defined by Webster a word not in common use in this country? A. Very true, but that does not excuse him from mentioning English meanings and not mentioning this country at all.

x Q. 155. But that is true? A. In many words, yes, but in many other words very deceptive.

x Q. 156. Taking the word "turbary," that is an instance of a word that is not commonly used in this country? A. No.

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x Q. 157. And in which Webster gave a British definition of it? A. Yes, absolutely.

x Q. 158. And it is used commonly only in Great Britain? A. Oh, yes, that is perfectly true, but it does not justify him; what he ought to have said was Great Britain, and an ignorant or semi-ignorant person would not be confounded by it.

x Q. 159. Where Webster defined a word which was used in a different sense in this country from the sense in which it is commonly used in England, he would give both meanings and designate one "English," would he not, as a matter of common practise? A. No, not as a matter of common practise; he would a good deal, but not so

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much as he ought to do. I should say about fifty per cent. of the cases where such a thing arises, he would not mention the American at all. If the usages were more English than American he would let the American go, and perhaps not even say in Great Britain.

x Q. 160. I gather that you have not a very high idea of Webster 1847 as a book? A. Why, the
7918 more I study it the less I think of it. I think he should have known more than to—I think his errors were largely, or I should say that he was tainted by Johnson, and that he does do things that he criticises in Johnson. For example, indefinite definitions and polysyllabic definitions.

x Q. 161. Throughout your direct examination you frequently used the word "Webster" or the pronoun "he." In each instance you were referring to the 1847 edition of Webster's edition? A.
7919 Yes, I was very careful; if I expressed any other edition I gave the name of it. But the point of the matter is the two books here, and so if I say the Syndicate book I would mean that (indicating), the red one, but I will try to say Webster 1847.

x Q. 162. In Defendant's Exhibit Imperial Dictionary of John Ogilvie, edition of 1850, I read from the preface as follows: "Notwithstanding, however, the acknowledged superiority of Webster's dictionary, over all others hitherto published, it does not come up to our idea of what a dictionary ought to be in order fully to meet the wants of the present day. Webster has done much, but he has not done enough. He omitted
7920 many English words and significations in frequent and already authorized use; his list of scientific and technical terms is not sufficiently

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7921

copious, and in defining or explaining those he has selected, he has not always consulted the best and most accurate authorities. Some of his definitions likewise have become inaccurate owing to the progress and the improvements made in the arts and sciences since the time he wrote. There are some other forms of a minor description to be found in Webster, such as wrong accentuations, unwarranted alterations in the orthography of certain words, and instances of false orthoepy.

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In adopting Webster's dictionary as the basis of the Imperial dictionary the great object of the editor in preparing the latter has been to correct what was wrong and to supply what was wanting in Webster, in order to adapt the new words to the present state of literature, science and art. Accordingly every page of Webster has been subjected to a careful examination, numerous alterations and emendations have been made, and a vast number of articles have been rewritten. Very many of Webster's explanations of important terms have been enlarged, and many new and more correct definitions of others given. New senses have been added to old words, where they were found wanting, and a multitude of new words and terms have been introduced, especially in the scientific and technological departments; so that to Webster's addition of twelve thousand words to Todd's Johnson, the further addition has been made of at least fifteen thousand words and terms." Do you know how far the editor or compiler of this dictionary conformed to that?

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A. Well, he conformed to it almost in regard to the scientific and technological and technical terms. He was particularly interested in that, and he gave that his own work, and he had assis-

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tants to help him as to the other things, and the others were minute, mostly. It is perfectly true that his criticism—Webster's 1847 was not up to 1847, revised in 1843, really, and you must understand the difference between this country and England at that time; they knew and were familiar with a great many things that we had hardly heard of.

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x Q. 163. This preface also contains the following statement: "More particularly this dictionary has for its object to comprehend all the words contained in Johnson's dictionary with the additions of Todd and Webster, and words selected from the other standard dictionaries and encyclopedias, together with many thousands of words and terms in use not included in any former English dictionary." Did you check his account to see how far he had conformed to that ideal? A. I looked up and tested his book pretty well for new words, words that were not in Johnson or Todd rather—Todd is the standard of Johnson's work—and I looked at his etymology pretty carefully.

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x Q. 164. Did he know any more about etymology than Webster did? A. No, he thought he did, but he did not; and as to additional articles, I was interested in the additional articles, as he said that it was not gotten out with any previous existing work in lexicography, and there are a good many quite interesting—

x Q. 165. Do you know from what sources they came, or did you pursue that? A. Well, yes, he regarded—no, I don't know precisely. But in his studies I know this: That he spent his time going over Webster and seeing what was lacking, and seeing what could be put in.

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x Q. 166. Do you know what use he made of Richardson's dictionary? A. Yes, he mentioned Richardson; he says there in the passage which I read—he says that Webster's is better than either of the other two.

x Q. 167. Either Richardson or Johnson? A. Either Richardson or Johnson. He meant Richardson and Johnson, but he uses Richardson quite a little.

x Q. 168. Is it an existing dictionary to-day, or is it a dead work? A. It is a dead work.

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x Q. 169. Did you examine complainant's parallel column exhibits prepared by Mr. Mawson in preparation for your testimony? A. I did, yes, some, not very much. That is to say I did not care very much about his minor dictionaries, Chambers and Cassell's and those—I have known them in the years gone by; I did not go over his prior ones; I was interested in what he had in his parallel columns.

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x Q. 170. You promised at your last examination to produce the exact name of the book referred to by you as the Bond book. Have you done so?

MR. CARROLL: Objected to as irrelevant and immaterial, and the witness is directed not to answer.

MR. HALE: The witness is requested to answer the question. He is called to show the alleged Websterian character of defendants' book, and this bears directly upon it.

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MR. CARROLL: He is called absolutely for the purpose of rebutting Mr. Mawson's testimony.

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MR. HALE: Which relates solely to the sources and origin of the books.

MR. CARROLL: This has no relation to his prior testimony whatever.

MR. HALE: The question is repeated.

MR. CARROLL: And by direction of counsel, the witness refuses to answer.

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x Q. 171. Was a dictionary ever published in England under the title "Webster's English Dictionary"? A. Not that I know of.

x Q. 172. Did you ever see a dictionary by that title? A. No.

x Q. 173. You do not know of any work by that title? A. No.

x Q. 174. You read a quotation from some work— A. From Worcester's preface.

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x Q. 175. No, with reference to the Ogilvie dictionary. Was the matter which you read quoted consecutively by you? A. No, I omitted what related to his different schools, and schools in which he had taught, and his marrying Susan somebody and all that.

x Q. 176. Your matter was not consecutively quoted matter, then? A. No, but it was—

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x Q. 177. Was the language absolutely quoted, or was it your statement of the substance of it? A. No, the language is all right. It was just as though you put dots in the sentences when you want to leave a sentence out.

x Q. 178. You stated in your former examination that you thought it would have been a little fairer to have underlined only identical words, and not to have taken count of what you have termed paraphrases. Why then in preparing these new exhibits that have been offered to-day

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did not you follow what you said would be a fairer method? A. Well, in the first place I did not testify that I thought it would have been fairer to mark only identities, because I certainly intended to mark those definitions which were practically the same as the identities. In using the word "paraphrase" then of those passages in black, which included sometimes more than—a good deal more than the different things from the Webster, from the Webster's New International—the fairness has come out in this way. Now, I have been most particular about those paraphrases. Unless it seemed to me that an absolute stranger would see the likeness at once, I have not touched them. I think we were discussing about—I think we were discussing a particular definition at that time, and you asked me wouldn't it have been fairer if I had stopped somewhere instead of blackening the whole column, the whole paragraph. I do not think I said—unless you have the record here—I do not think I said that it would be fairer to exclude paraphrases altogether, but to be very particular about paraphrases and not include in the paraphrases that I marked anything except what was practically in the Syndicate book's definition.

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x Q. 179. You are willing to stand by---

MR. CARROLL: The question is objected to as incorrectly summarizing the witness' testimony.

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x Q. 180. You are willing to stand by everything you have marked as a paraphrase or as a practical identity in the new exhibits presented today? A. Yes. These new exhibits have been

794¹*Prof. Harry Thurston Peck—Re-direct.*

made with very scrupulous care and perfect conscientiousness.

x Q. 181. And you think they are fairer than your original exhibit? A. I do, really, yes; they are more extensive.

RE-DIRECT EXAMINATION by Mr. Carroll:

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R-D. Q. 182. What were the three great points of difference between Webster's spelling and Worcester's spelling?

MR. HALE: Objected to as irrelevant and immaterial.

A. Well, Worcester kept the "re"; Webster changed it to "er," and Worcester kept the "l's" and Webster did not.

794³

R-D. Q. 183. You mean in words like traveler? A. In words like traveler, and also in the great class of words ending in "our" like "honour." In other words, the two schools most violently differed with regard to these spellings.

R-D. Q. 184. How are these words spelled in defendants' dictionary? A. They are spelled in the same way as Webster; that is, those particular words. Sometimes Webster himself there forgets and spells them in the British.

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R-D. Q. 185. What did you wish to point out with respect to the word "cotillion"? A. Oh, I wanted to show that glaring inaccuracy there which, if I may read from the preface to the New International—it says "The word 'cotillion' is spelled in the Webster's New Illustrated 'cotillion.'" Now, then, this is very interesting. It means that they have not kept up with the Webster theory of spelling. They have changed it a

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good deal, and they mention "cotillion" as one of the words which they have changed, and they have gone back to the other system which you may call British, or what you please; that is, the Webster 1847 spells it "cotillon" but the present Webster, the New International, spells it "cotillion" and he gives a list of other words. For instance, Webster spells "asbestos" in the 1847 as "asbestus." Now, they have it in the International as "asbestos"—quite a number of words like that.

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R-D. Q. 186. In the two hundred pages marked by you, what was the total number of titles appearing in the Syndicate book? A. 6,932.

R-D. Q. 187. In the two hundred pages marked by you, what was the total number of titles which appeared both in Webster's '47 and in the Syndicate book? A. Well, in both books—5,651.

R-D. Q. 188. What, therefore, is the number of titles in the Syndicate book in the two hundred pages counted by you which did not appear in the Webster 1847 at all? A. 1,281.

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RE-CROSS EXAMINATION by Mr. Hale:

R-x Q. 189. You have spoken of two schools of spelling in connection with Webster and Worcester. Do you mean that Webster represented one school, and Worcester the other school? A. It came to that, yes. There was quite a long controversy for several years between the Worcesterians and Websterians. It was not only as regards spelling, but that was one of the things.

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R-x Q. 190. And that controversy was what you referred to as a clash of books in your previous testimony? A. If I did say that, yes; that is what I had reference to.

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Prof. John Carew Rolfe—Direct.

R-x Q. 191. That would correctly describe it?
A. Yes.

MR. HALE: That is all.

MR. CARROLL: That is all.

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THE WITNESS: I wish to make a statement, in reference to the strife between the Websters and Worcesters. I want, for my own sake, to be accurate. I think Mr. Hale said "That is what you mean by the clash of books." Well, that was not based entirely on orthography. There is one other thing that was even as important as that, and that was pronunciation, and there are two systems of pronunciation. Now, you know that there is the Worcester system also, and just as a matter of my own reputation, I want to say that the battle of the books or the clash of the books was based not only on orthography, but upon orthoepy.

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Deposition closed.
(Signature waived.)

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PROFESSOR JOHN CAREW ROLFE, a witness called by and on behalf of the defendants, having been first duly cautioned and sworn, testified as follows:

DIRECT EXAMINATION by Mr. Carroll:

- Q. 1. Will you state your age? A. 53.
- Q. 2. Residence? A. Philadelphia, Pennsylvania.
- Q. 3. Street number? A. 44 Chestnut Street.
- Q. 4. Occupation? A. Professor of Latin.

Prof. John Carew Rolfe—Direct.

7953

Q. 5. Whereabouts? A. University of Pennsylvania.

Q. 6. What degrees have you? A. "A.B.," "A.M." and "Ph.D."

Q. 7. From what places? A. "A.B." Harvard; Ph.D. and A.M., Cornell.

Q. 8. What honorary degrees have you, if any? A. None.

Q. What lexicographical work have you done? A. I studied lexicography with Professor Woelflin in Munich for a year, and I have written numerous articles on lexicography in German and American periodicals and have made vocabularies, etc., and have had occasion to use dictionaries a great deal.

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Q. 10. Have you been a member or officer of any learned societies in this country? A. I was President of the American Philological Association last year and President of the Classical Association of the United States and I am a member of the American Philosophical Society of Philadelphia.

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Q. 11. Where have you been instructor or professor? A. At Harvard and Cornell.

Q. 12. Please give the years? A. Well, Cornell in 1885 to 1888; Harvard 1889, 1890; Michigan, from 1890 to 1902; Pennsylvania, 1902 to the present time. Also in the American School at Rome in 1907 and 1908, and Columbia, Harvard and Cornell summer schools; Columbia 1909, Harvard 1901 and Cornell 1903.

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Q. 13. If you were attempting to ascertain the origin of a dictionary, what method would you pursue?

MR. HALE: Objected to as irrelevant and immaterial, calling for a mere opinion and as speculative.

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Prof. John Carew Rolfe—Direct.

A. Well, I should say I should follow substantially the plan followed by the witness who was last examined. That is, I should go through the dictionary and mark the absolute correspondences, the virtual correspondences, and then the paraphrases.

Q. 14. Have you ever used this method in attempting to ascertain the origin of a dictionary?

7958

MR. HALE: Same objection.

A. Never in the case of the origin of a dictionary, but in the comparisons between other books. I have had occasion to use it twice in comparing two books; one was suspected of being taken from the other, and I followed it informally in the case of dictionaries but not in any special cases.

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Q. 15. The witness Mawson testified that this method of determining the origin of a book was inaccurate and unreliable for the reason that all dictionaries in any given language must have a certain amount of similarity due to four reasons which he stated in his testimony. He gave as his conclusions a percentage of 38, which he said must inevitably be identical. What is your opinion on that subject? Is his objection a valid one?

MR. HALE: Objected to as irrelevant and immaterial.

7960

A. I should say not; that is, I should say in examining a dictionary that one must inevitably include all matters in which it corresponded with another.

Q. 16. Have you examined the two exhibits offered by Professor Peck with his last testimony, namely, Webster's 1847 dictionary and Webster's New Illustrated, both marked by him? A. I have.

Prof. John Carew Rolfe—Direct.

7961

Q. 17. How carefully have you examined these books? A. With great care; spent the better part of a week examining them, and I examined a great number of pages with very great care.

Q. 18. Would you say that the definitions which have been underlined by Dr. Peck could be accounted for by coincidence, inevitableness, use of synonyms or use of common sources?

MR. HALE: Objected to as incompetent, irrelevant and immaterial, and calling for a mere opinion as to which expert testimony is not admissible, and as calling for possibilities.

7962

A. I should say not all by any means, only a very small amount of them.

Q. 19. What is your opinion of the character of the marking made by Dr. Peck?

MR. HALE: Objected to as incompetent, irrelevant and immaterial, as calling for an opinion.

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A. I examined them with that special idea in view, and my conclusion was that they were carried out with extreme conscientiousness.

Q. 20. Did you notice any instances of markings which might have been marked with more advantage to the defendant?

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MR. HALE: Objected to as incompetent, irrelevant and immaterial, as leading, and as calling for secondary evidence, the books themselves being the only primary evidence.

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Prof. John Carew Rolfe—Direct.

A. I noted some under each head, that is, some blue ones which I thought fairly might have been marked red, and more especially in some places unmarked, which might have been marked black; that is paraphrases.

MR. HALE: Can you point them out?

7966

THE WITNESS: I cannot point out any number of them; I think perhaps a few; there are a few. Perhaps it would be enough to state the words under which they occur. The words that I have here are daisy, damage, echinoderm, echinus, falsify, gahnite,—those will serve as examples.

7967

Q. 21. From your examination of these two books and from the markings in them, what is your opinion as a literary man about the propriety of calling the defendants' book a Webster's dictionary?

7968

MR. HALE: Objected to as incompetent, irrelevant and immaterial, as calling for the opinion of the witness upon a question as to which an opinion is not admissible, and as calling for the conclusion of the witness upon one of the main issues in this case; also for his opinion on a matter of law.

A. From the point of view in which the question was asked I should say it was admissible; that was your question, was it admissible?

MR. CARROLL: Read the question.

(Question repeated by the stenographer.)

Prof. John Carew Rolfe—Direct.

7969

THE WITNESS: It seems to me on the whole, proper.

Q. 22. What percentage would you say was an approximately sufficient percentage of identity between two books, in order to say that one is based upon the other?

MR. HALE: Objected to as irrelevant, immaterial, incompetent, and as calling for a mere opinion and a guess.

7970

A. It is a matter which I have given some thought to in other connections; I should say about 50 percent.

Q. 23. Why do you say that? A. Because that is half of the 100; it is about half of the material in the book, and it seems I should say that a book in which half of the material was taken from another book was or might fairly be said to be based on that book.

7971

Q. 24. In what other cases does that come up? A. Well, it would come up in the case of any book that was supposed to be based on another book, or in any case where a person was considering the propriety of calling a book which he made a book based on such and such a book.

Q. 25. And it is your opinion that in all such cases if one book is 50 percent identical with another, it may with propriety be named after that other?

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MR. HALE: Same objection.

A. That is my opinion.

7973

Prof. John Carew Rolfe—Cross.

CROSS EXAMINATION by Mr. Hale:

x Q. 26. Are you acquainted with the reputation and standing of Webster's dictionary as an authoritative reference book in this country?

MR. CARROLL: I object to that question as calling for something not in proper cross examination, and something which is improper at this time.

7974

MR. HALE: It is strictly proper cross examination.

A. I am.

x Q. 27. What is that reputation? A. Well----

x Q. 28. Good, bad or indifferent? A. Well, it is good. I thought you wanted me to go into details.

7975

x Q. 29. When you use the word "based" in speaking of one book as being based upon another, just precisely what do you mean by the word "based"? A. My idea would be that the book upon which the other was said to be based was the one from which the author of the other book took the foundation of his material, changing it—

7976

x Q. 30. You mean it was the main source of the contents of the later book? A. I do, yes, and with such corrections and changes as he might see fit to make in the interest of accuracy or scholarship or something of that sort.

x Q. 31. In other words, you think he must have the book before him in doing the work and actually see it? A. Yes.

x Q. 32. Just what did you mean by a paraphrase? A. Well, by paraphrase I should understand taking a definition or a portion of a book

Prof. John Carew Rolfe—Cross.

7977

and stating the same thing in different language without any essential change of that—or of ideas.

x Q. 33. Would there have to be any identity of language in order to constitute a paraphrase? A. Ordinarily I should say there ought to be something that would give you or give a connection between the two; it might be slight. I recall one case in my examination of which one word—I do not recall the word—I do recall the word, but I cannot recall the definition, under which it occurred, but that one word seemed to me unusual.

7978

x Q. 34. In other words, the identity must be in some significant particular, some significant word, rather than a common word? A. Yes, in the case of the paraphrase, yes.

x Q. 35. And what is your definition of abridgement? A. Abridgement—I should understand the taking of a definition consisting of a number of words and omitting a portion of it, and retaining others. For instance, if the word was defined as quick, fast, rapid, and the fast were omitted, I should say the definition was abridged.

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x Q. 36. Is it your idea that the main difference between an abridgement and a paraphrase is that an abridgement is a shortening of the original, preserving some part of the same language, whereas a paraphrase need not necessarily be shorter, and need not have so much identity of language; is that correct? A. Yes.

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x Q. 37. You have spoken of the existence of identities between two books as being a fairly reliable indication that one book was based upon another, have you not? A. I have, yes.

x Q. 38. And the greater the extent of the identities the stronger the presumption would be that the book was taken? A. Yes.

7981

Prof. John Carew Rolfe—Cross.

x Q. 39. So that if one book has certain identities with respect to another book, and still more identities with respect to a third book, you would give it as your opinion that the book was based upon the third book rather than upon the second book mentioned, would you not? A. I don't know whether I understand you precisely.

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x Q. 40. Suppose a given book whose source you were seeking contained 45 per cent. of matter, or of words identical with the previous book, and it also contained for example, 60 per cent. of matter identical with another book; which one of the last two books would you say, in your opinion, it was based or founded upon? A. I should say that depended on the relation between the other two books in question; that is, if the second book might be derived 50 per cent. from the 45 per cent book, it might be derived from 60 per cent. book.

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x Q. 41. Well, suppose they were distinct works with no connection shown between them. A. Then I should say it was based more on the 60 per cent book, naturally.

7984

x Q. 42. In seeking the origin of a literary production, which do you consider the safest to rely upon, the similarities or the differences between the books? A. I should say it depended on which were the greater number. That is, if the similarities were very great, and the differences comparatively small, it would seem that the similarities would be more important.

x Q. 43. What part in that line of endeavor does the existence of common errors play in determining whether one book was used in the composition of another? A. Those are fairly good evidences, I should think, in many cases.

Prof. John Carew Rolfe—Cross.

7985

x Q. 44. Oddities or significant words would play substantially the same part as common errors, in coming to the conclusion, would they not?

A. I should think so.

x Q. 45. Suppose one book was more than 98 per cent. identical with another book previously existing. What would you say as to the relation of one book to the other? A. I should say it was very close, that the second was based on the first, and almost a copy of the book, practically, of the first.

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x Q. 46. I show you Complainant's Red Letter Exhibit which has been offered in evidence in this case, in which certain pages in defendants' book which Professor Peck compared with Webster's 1847 are compared with an English book termed the "British Empire Dictionary." The identical portions of the two books are printed in red, and the differences in black. What would you say was the relation between the book in the right hand column, Webster's New Illustrated Dictionary, to the book in the left hand column, headed the "British Empire Dictionary," applying the principles which you have explained on your direct examination?

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MR. CARROLL: Objected to as irrelevant, immaterial, the sole issue in this case being whether or not the defendant is entitled to call its book "Webster", and what relations it may have to other books being purely immaterial.

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A. If I were testifying on that question I should say that the resemblances were so great as to indicate relations between the two books.

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Prof. John Carew Rolfe—Cross.

x Q. 47. And what would be the relation indicated by those resemblances? A. A close relation.

x Q. 48. So close in fact that you would say that one book was practically copied from the other, would you not?

MR. CARROLL: Objected to as leading.

MR. HALE: This is cross examination.

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MR. CARROLL: It was not touched upon on the direct examination.

MR. HALE: The question was touched upon in the direct examination when you had him testify as to the means of ascertaining the source of one book, and its relation to another. I am now testing the application of those theories.

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A. Assuming the correctness, there can be no question, assuming the correctness of the exhibit for complainants.

x Q. 49 And if in addition to that the author of the book termed "Webster's New Illustrated Dictionary" has stated that he prepared it mainly from the other dictionaries there exhibited, would you have any doubt then as to the relation of one book to the other? You mean if the editor of this book said that he prepared it—

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x Q. 50. Yes. A. No, I should not, assuming always the correctness of the exhibit.

x Q. 51. I presume you will agree to the statement that if matter appears in a book, or matter appears in a dictionary, giving senses and meanings which are not contained in any form in a prior dictionary, that as to those senses and meanings the latter book is not paraphrased or abridged from the prior book? A. Yes.

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7993

x Q. 52. In other words, a paraphrase or abridgement always implies an original? A. Undoubtedly, yes.

x Q. 53. And the sense must always be conveyed in different language? A. Must correspond, yes, in different language.

x Q. 54. Could a man with a basso profundo voice pronounce a word with an acute accent? A. It depends on what you mean by acute accent. I do not understand what you mean. If you mean he could pronounce a Greek word—

7994

MR. CARROLL: Just a minute. I have been waiting patiently, Mr. Hale, and I am not going to allow the witness to go on much further on this line, and I will simply warn him not to answer.

(Question repeated)

THE WITNESS: That depends on what you mean by acute accent. He could pronounce a Greek word which was pronounced with an acute accent.

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x Q. 55. Webster defines that as follows: "An acute accent is that which elevates or sharpens the voice"? A. Well, that is a different sense.

x Q. 56. Would you consider the following an abridgement of that definition: "High in pitch, or shrill"?

MR. CARROLL: Objected to as irrelevant, immaterial, and I direct the witness not to answer.

7996

MR. HALE: The question is directed to ascertain the meaning of the word "abridgement" or "paraphrased" which he used in his direct examination. Will you please answer the question?

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MR. CARROLL: You are directed not to answer.

MR. HALE: The Special Examiner is requested to certify this question to the Court for a ruling as to the propriety of the question, and the duty of the witness to answer.

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MR. CARROLL: The purpose of this session is simply to rebut the testimony of the witness Mawson; only those matters have been gone into on direct examination, and only those matters can be gone into on cross examination.

MR. HALE: The purpose of the cross examination is to determine the meaning of the explanations given by the witness on direct examination, in the giving of which he used the word "paraphrase."

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MR. CARROLL: The witness has already sufficiently indicated what he means by the word "paraphrase."

8000

x Q. 57. Would you deem, for example, that in an exhibit designed to show similarities and alleged paraphrases in defendants' book claimed to have been made from Webster 1847, that the two words "sharp, pointed" was a fair paraphrase of the following definition from Webster: "An acute angle in geometry is one that is less than a right angle or which sub-tends less than 90 degrees. An acute angle triangle is one whose three angles are all acute, or less than 90 degrees each; an acute angle cone is one, the angle at the vertex of which is acute"? A. Hardly.

x Q. 58. You would not deem that fair marking if the words "sharp, pointed" were marked in defendants' book to indicate that the definition read from Webster had been paraphrased or abridged?

A. It is very difficult to answer those questions without seeing the two definitions before one, and studying them, but offhand the resemblance does not seem very close in that particular case.

x Q. 59. You would not discover any internal evidence that one book was based on the other from that instance alone? A. I should not say so on that instance.

x Q. 60. You see nothing in "sharp, pointed" that indicates the source in the language read from Webster? A. Is that the only definition, sharp, pointed?

8002

x Q. 61. That is the only definition in defendants' dictionary which is claimed to be an abridgement of the language read from Webster? A. Something would depend, of course, on the context, I should say, in which the word occurred.

x Q. 62. In the matter read, you do not discover any evidence of connection between the two works? A. So far as I can follow it; of course, as I say, it is very difficult to give an opinion on such a question as that.

8003

x Q. 63. In Complainant's Parallel Column Exhibit, I find compared the following three definitions of the word "teratology". In defendants' dictionary: "That branch of biography which treats of mal-formations or deviations from the normal type of animal and plant structure." In Webster's dictionary of 1847, the definition is: "That part of physiology which treats of mal-formations and monstrosities." In Cassell's English dictionary the definition is: "That branch of biological science dealing with monsters and mal-formations." I call your attention to the fact that defendants' dictionary uses the phrase "branch of biological science" while Webster

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8005

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uses the phrase "that part of physiology." In determining the origin of the particular definition of that word, in accordance with the principles which you stated on your direct examination, do you discover any significant words which would lead you to think that Cassell's dictionary had been used rather than Webster? A. It does not seem to me that it is quite fair to turn aside from a work to which I have given careful examination and given a careful study, and then to ask me to give offhand opinions.

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MR. HALE: The three pages are pasted before you in one sheet so they may be readily compared, and I am inquiring only as to a single definition.

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THE WITNESS: There are a number of general principles that affect the statements that I have made, and that is—take this very case of physiology and biology: I doubt whether in Webster's time the term "biology" was used. I think that is rather a new thing, so that I should consider the omission of biology a significant thing. Now, your question was between Webster and Cassell— I do not think I should be able to give an opinion there for the reason that as I say that biology is and seems to me is a new term, a modern term, comparatively recent—

8008

x Q. 64. If defendants' editor had been—

MR. CARROLL: Please let him finish.

THE WITNESS: (Continuing) And then the other seems to me—the other one might be a paraphrase of the other, it seems to

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8009

me; that is, they both deal with—both have, if I am not mistaken, the word “mal-formations”, which seems to be the characteristic thing.

x Q. 65. That is common to all dictionary definitions of that word, is it not? A. I could not say.

x Q. 66. Do you not regard as significant the fact that defendant's definition of that word, while giving the sense which is contained in Webster, and also the sense which is contained in Cassell's dictionary, follows the variations of Cassell's from Webster and uses the word “biology” in place of the word “physiology,” and the word “branch” instead of the word “part.” Do you consider those things at all significant in that short definition?

8010

MR. CARROLL: Objected to as irrelevant and immaterial, and notice is given to counsel for complainant that he is attempting to make this witness his own; that ordinarily counsel for defendants would patiently submit to this appropriation, by counsel for complainant, but this testimony must be printed and ready for final hearing one week from Wednesday, and if counsel for complainant insists upon pursuing this line of examination, defendants' counsel will be forced to direct the witness not to answer.

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MR. HALE: Complainant's counsel intends to ascertain the full meaning of the witness' testimony upon direct examination; complainant is not bound by mere general statements. In order to ascertain

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the facts accurately, the statements of the witness must be applied to particular cases.

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A. Well, as I have already said that I did not consider the substitution of "biology" for "physiology" a significant case, as I say that is a comparatively new term, within my own recollection surely; the term "physiology" has been differentiated into various branches.

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x Q. 67. If defendants' editor had been working direct from the Webster before him in making his definition, and applying the principles which you have stated should be applied in ascertaining the origin of a book, do you think he would have made the variations which apparently have been made between the definition in Webster, and, for example, the definition in Casell? A. I notice one or two features in the definition that might happen in that thing; that is, I notice several times that such changes as between synonymous words, as "branch" and "part" were made; apparently, as far as I could figure it out, the compiler was introducing a little originality into his work; such changes are not infrequent.

8016

x Q. 68. You noticed those changes when it did not shorten the definition or improve it materially, in your opinion? A. Oh, yes, when it did not improve it at all, simply variety; that is, "branch" for "part" would be a good example.

x Q. 69. I call your attention to the definitions of the word "terminator" as contained respectively in defendants' dictionary, Webster's 1847 and Cassell's. Those definitions are respectively as follows: Defendants', "One who or that which terminates; the dividing line between the

illuminated and non-illuminated part of the moon." Webster's definition: "In astronomy, the dividing line between the enlightened and unenlightened part of the moon." In Cassell's dictionary: "One who or that which terminates; the dividing line between the illuminated and dark part of the moon." Please compare those three dictionaries and apply the rules for ascertaining the source of literary matter, and say which, in your opinion, the defendants' definition most probably came from? A. There is another general principle that comes in there, and that is the improvement of Webster's definition. It seems to me that it is obvious that Webster's use of enlightened and unenlightened there is clearly not modern, if it ever was good English; it may have been good English, I suppose it was, but it certainly would be misleading now, so that that would naturally be changed. Then Webster has omitted a meaning which is an obvious one, that is, "one who terminates."

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x Q. 70. So that meaning did not come from Webster? A. No, that meaning must have been added, naturally.

x Q. 71. Now, do you find those two matters in which you criticised Webster corrected or changed in Cassell's in identical language with defendants' definition? A. Yes.

x Q. 72. Now, what in your fair opinion do you think of the probabilities as to whether the composer of this definition in defendants' book had before his eyes and was working from, the definition in Webster or the definition in Cassell? A. My general opinion about the work of this compiler, if I may be allowed to say that, is that he had Webster before him; Webster was his pri-

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mary source; that is, he worked from Webster; when he came to definitions of a kind which were archaic or incorrect he either made his own definitions or went to other sources. Now, it is pretty difficult to say—I should think “one who terminates” or “that which terminates” might be made independently by two men.

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x Q. 73. According to the principles that you have stated, however, which of those two books, Webster or Cassell, is indicated as the source of defendants’ definition? A. Well, I do not think that it is a fair case, because the definition of “terminator” is unsatisfactory in Webster.

Well, similarity of language is not a reliable test, or even identity of language as to the source of a book. You must make some allowances, I think.

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x Q. 74. This is one of the cases where an allowance must be made? A. I should say so, off-hand, yes. At the same time there is some—I think the definition, the second definition in either book might be called a paraphrase of Webster with an addition.

x Q. 75. In other words, they both give the sense— A. The addition, of course, does not come from Webster.

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x Q. 76. Two dictionaries defining the same word in as short a form as possible could hardly avoid giving the same sense, could they? A. I should hardly think so.

x Q. 77. That is, one definition in one dictionary could almost always be called a paraphrase of a definition in another dictionary, could it not, providing the sense were given?

MR. CARROLL: Objected to on the ground that this witness has already carefully ex-

Prof. John Carew Rolfe—Cross.

plained what he means by paraphrase, namely, that he would consider it proper to mark as a paraphrase anything which did not contain some distinctive words.

A. They all have the dividing line, and they all have, in substance, between the dark and light part of the moon, but they express it—

x Q. 78. They could not very well avoid having that sense? A. No, I do not see how they could.

x Q. 79. And the defendants' definition has the significant words in Cassell's, have they not? That is, a large part of the matter omitted from Webster? A. I think there is nothing omitted; it is simply—

x Q. 80. The first definition, for example? A. Oh, the first definition is omitted, of course.

x Q. 81. Is omitted in Webster and is in Cassell? A. Yes.

x Q. 82. That indicates nothing to your mind? A. It would not, without comparison of some other dictionary; that is, it indicates to my mind that the compiler of this dictionary, the Webster's New Illustrated, added to Webster's definition, either from his own inner conscience or some other source; it depends on how he worked.

x Q. 83. Judging solely from what appears in the printed books, what makes you think he used Webster's dictionary and added something to it? A. I do not think there is anything in that particular definition to indicate it.

x Q. 84. Nothing to indicate a Websterian origin of that particular definition? A. Well, I don't know; on the other hand, whether there is or not, because I should have to look in some other dictionaries, and see how that line could be started.

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Prof. John Carew Rolfe—Cross.

x Q. 85. There is Chamber's definition. Look at Chamber's and see if that helps you? A. Well, it is closer to Webster than it is to Chambers.

x Q. 86. And closer to Cassell's than to either of them? A. Yes.

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x Q. 87. Please look at the definition of the word "teraph," and compare it with the definitions of the same word as contained in Webster's 1847, and in Chamber's dictionary and in Cassell's dictionary, and say what, according to your principles of ascertaining the geneology of definitions was the most probable source of that definition, and include in your answer a statement whether you find any indication that Webster's definition was copied or abridged?

MR. CARROLL: Also look at "teraphim" in the Webster.

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A. Webster has two definitions, "teraphim"—that is a peculiar case, because it seems to me that any one of those definitions—I think that Webster is the source of defendants' definitions.

x Q. 88. Which definition in defendants' book? A. In all of them.

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x Q. 89. Point out what indicates that to your mind? A. Well, in the first place he lays stress on the "Hebrew" part of it; that is natural enough, in "images" of household gods. Cassell does not use the images, but uses "idols,"—I was reading from the wrong place. Webster has only this single one. Well, those definitions have been amplified, unquestionably. Now, what was your question?

(Question repeated)

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x Q. 90. Point out what indicates that to your mind? A. I understood somebody to say that Webster had two definitions, one the singular and one the plural.

MR. CARROLL: He has.

THE WITNESS: I see. I should have to think a good deal about that to give a satisfactory answer. A good deal of the material is in Webster; that is, he refers to it as Hebrew. 8034

x Q. 91. You mean the sense? A. Yes; of the three definitions they seem to me quite different in phraseology, considerably.

x Q. 92. And all the similarities that appear—

MR. CARROLL: Had you finished your answer? 8035

THE WITNESS: I had not formulated the rest of it, but I am willing to rest.

x Q. 93. And all the similarities that appear exist between the defendants' dictionary and Cassell's and Chamber's, but none with Webster, is that correct? A. No, I should not say that; that is, we have in Webster in the parenthetical mark "Hebrew" which is a sufficient source for the statement that it was consulted by the intelligent Hebrews, and we have the word "household deities," which is not very different from household gods or images. I think the main question, or an important question is there, whether one is correct in assuming that the man was working from this dictionary as a foundation. 8036

8037

Prof. John Carew Rolfe—Cross.

x Q. 94. Which dictionary do you mean by "this dictionary"? A. From Webster; if he was working with that as the foundation, I think the language could be accounted for.

x Q. 95. But you do not find any indication in that particular definition that he was working from Webster as a foundation? A. Not in that particular one, no.

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x Q. 96. I find the word "tercentenary" defined in Webster's New Illustrated Dictionary in the following words: "Comprising three hundred years; a date or function commemorating some event occurring three hundred years before." That word is not defined in Webster's 1847, but in Cassell's I find the following definition of it: "Comprising three hundred years; a date celebrated in commemoration of some event which occurred three hundred years before." On the principles which you explained and on which you based your opinions expressed on direct examination, would you say that defendants' definition of that word had any relation to Cassell's definition of that word? A. I should say that it resembled it in language.

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x Q. 97. Almost identical with it, is it not? A. Not quite, but—

x Q. 98. Very nearly? A. Very nearly, yes.

x Q. 99. Connected phrases are used, and identical, are they not?

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MR. CARROLL: I object to this line of examination on the grounds already stated, and on the further ground that this is obviously not proper cross examination; particularly on the grounds that the exhibit speaks for itself, and that as counsel for complainant explained in the first instance

Prof. John Carew Rolfe—Cross.

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he was only citing these few examples in order to ascertain exactly what the witness meant by the term "paraphrase," and he has shown by his later questions that this was a mere subterfuge on his part, and that he had no set purpose in mind, but that he was simply attempting to usurp this witness as his own witness, and the warning is therefore repeated.

MR. HALE: The statement of counsel is entirely incorrect. This witness testified in chief that he was able by comparing books to ascertain their literary origin. This exhibit affords a perfect means of testing that assumed ability, because it compares several dictionaries in parallel columns.

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MR. CARROLL: This exhibit consists of a few pages taken from a few dictionaries. The witness has no opportunity during the short time when he is on the stand to examine even these sporadic pages, and counsel for complainant has not even asked him to do that, but has picked out certain particular words. Obviously he cannot form any conclusion about the source or origin of any of these books from these scattered instances.

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MR. HALE: It simply demonstrates the utter worthlessness of the line of proof which the defendant has adopted to show the origin of defendants' dictionary.

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THE WITNESS: I simply want to make the statement that those words which are not included in Webster are not included in these percentages; that is, they do not enter into the question of origin at all, be-

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Prof. John Carew Rolfe—Cross.

cause they could not come from Webster if he did not have them. There the compiler of the book must make his own definition, or take it from some other source.

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x Q. 100. That is exactly what I am getting at. Now, from this word then there is an indication that defendants' editor had some other source than Webster for his book? A. There is, yes.

x Q. 101. And there are indications that Cassell's was the probable source of this particular definition, judging by the principles laid down by you on your direct examination? A. Yes, but there might be half a dozen other dictionaries that—

8047

x Q. 102. Well, there might be half a dozen common sources? A. I might be able to find or somebody else might be able to find another dictionary which had a definition nearly identical.

x Q. 103. Yes, there might be three or four of them? A. Yes.

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x Q. 104. So similarity or even identity does not infallibly indicate the source, is that correct? A. No, I should not say that it was; that would mean that those various dictionaries went back—or ought to indicate that those dictionaries went back to common source. That is, out of the numerous books that are based on Webster there must be a great many that would have definitions that correspond closely with his. Now, in the case of the Webster's New Illustrated Dictionary, it would not be absolutely fair to say that that definition was taken from here without comparing one or two other dictionaries to see if they had definitions which might indicate a common source of some kind.

Prof. John Carew Rolfe—Cross.

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x Q. 105. Assuming that no other dictionaries contained that language as closely similar as defendants' dictionary, and Cassell's dictionary, then what, according to your principles, would be the correct conclusion?

MR. CARROLL: Question objected to as containing an unfounded assumption.

A. Well, offhand, I should say that it would indicate close connection between the two. 8050

x Q. 106. To what extent, if at all, did you compare defendants' dictionary with other books with a view to ascertaining its source or origin? A. Well, when I examined his books I had before me several dictionaries.

x Q. 107. Which ones? A. I had the Standard dictionary, the Century dictionary,—

x Q. 108. In other words, you compared Defendants' Webster's New Illustrated Dictionary with Webster's 1847 and Standard dictionary and the Century dictionary? A. Not in all cases; I compared his dictionary with Webster's dictionary with a view to ascertaining the correctness of his system and the conscientiousness with which it was marked out. 8051

x Q. 109. You mean Professor Peck's system and markings? A. Yes. In not a few cases and especially in the case of, in the scientific terms where there were deviations I looked them up in these other dictionaries primarily with a view to ascertaining whether they were correctly taken from these dictionaries or whether they were definitions that might have been made up to bring those scientific terms into more modern terminology, or otherwise to improve them. 8052

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Prof. John Carew Rolfe—Cross.

x Q. 110. You did not make any systematic comparison of the entire book with Webster's 1847 to determine for yourself the relation between the two, if any, did you? A. I went over a great number of the pages which have already been marked.

x Q. 111. Did you go over all the pages marked by Dr. Peck in these exhibit volumes? A. I went over at least two-thirds of it.

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x Q. 112. Did you go over all the markings of every character in those books? A. I went over all the markings with very great care, and compared the marked phrases with the language in the Webster dictionary; that is, in the Webster dictionary.

x Q. 113. You did not compare the defendants' dictionary with the dictionary called the British Empire dictionary? A. No; I used such dictionaries as I happened to have on my shelf at the time.

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x Q. 114. And you did not compare it with the book called "The Student's Imperial Dictionary"? A. No.

x Q. 115. Or with the book called the "Crown Dictionary"? A. No, because that was only incidental; it was my principal purpose to test his markings with reference to Webster.

8056

x Q. 116. Test Professor Peck's markings? A. With reference to Webster; just the system and the conscientiousness with which it was carried out.

x Q. 117. Did you see at any stage of your work the parallel column exhibit which I have exhibited to you, and upon which I have pointed out particular words? A. No.

x Q. 118. It was not called to your attention in any way? A. Not that I know of.

Prof. John Carew Rolfe—Cross.

8057

x Q. 119. Were you told that it was claimed that the defendants' book was based on the British Empire Dictionary? A. No.

x Q. 120. What were you told with reference to the purpose of your investigation? A. Well, I don't know that I can recall all the details. I was given a general idea of what the nature of the point at issue was, and I was asked to examine this method as an expert, that is, to test it, with a view to seeing that it was a correct method, about which I had no doubt in the first place, and whether it was conscientiously carried out.

8058

x Q. 121. You stated that in your opinion you thought that upon the whole defendants' dictionary was properly called a Webster's dictionary. Please amplify that answer, and state how and why you entertained that opinion? A. Well, first because as I was satisfied in my own mind that it contained at least 50 per cent. of material taken directly from Webster's dictionary of 1847.

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x Q. 122. And that was based on your verification of Professor Peck's markings? A. Yes, that was based on that.

x Q. 123. What else? A. And also some other things that occurred to me. Of course, we do not go absolutely hard and fast by red marks and so on, but as you work through a thing of that kind you get an impression. I do not know how much that is, either. That depends on the extent to which one is recognized as an expert, but you get an impression on how the man worked. And when I got through my impression was a little stronger than the percentages would indicate, that is, as to the propriety of the use of the term. That was based on the impression that I had. The term "Webster" has been used very extensively

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Prof. John Carew Rolfe—Cross.

in books which were published by other firms than those who published the Webster's unabridged.

x Q. 124. Do you know of any standard authoritative Webster dictionary published by any other firm than that publishing the Webster unabridged? A. I cannot say that, but I know of books that bear the title "Webster"; I had occasion to look over the catalogue in the Public Library.

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x Q. 125. Who called your attention to that? A. I was looking at it for a purpose of my own, so it seemed to me that in view of these facts it was proper to call a book that was based on Webster a "Webster's." I should not feel the same about a dictionary, which had not so wide a use, and had not been so extensively used in that way as Webster's.

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x Q. 126. Do you think it would be proper to call Funk & Wagnall's Standard dictionary a Webster's dictionary? A. I should if it were based—if they had fifty per cent Websterian material.

x Q. 127. Without ifs or ands, taking the books as they are to-day, do you think it would be proper to call it a Webster dictionary? A. No, I should not.

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x Q. 128. Would you think it would be proper for the Century dictionary to be called "Webster's" dictionary? A. Well, all those things are so dependent on the way in which the dictionary is made.

x Q. 129. As a scholar, and acquainted with dictionaries which are in ordinary use, do you think it would be proper to call the Century dictionary a Webster's dictionary, or to change its name and call it Webster's? A. No, I do not.

Prof. John Carew Rolfe—Re-direct.

8065

x Q. 130. And you do not think it would be proper to call the Standard dictionary a Webster dictionary? A. No.

x Q. 131. And do you think it would be proper to change the name of a dictionary published ten or twelve years ago and call it Webster's dictionary? A. I do not know that dictionary.

x Q. 132. And you do not know whether or not fifty per cent of defendants' volume is taken from Webster? A. Why, I verified his percentages.

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x Q. 133. Well, you heard Professor Peck testify that he did not mean to testify that fifty per cent of the whole volume was taken from Webster's. A. I know, of course, that the new words, which do not appear in Webster could not be taken from Webster's. That is apparent on the face of it.

x Q. 134. And you do not know how many of them there are? A. I have heard the figures, about twelve hundred, wasn't it? Something like that.

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RE-DIRECT EXAMINATION by Mr. Carroll of the
Witness Rolfe:

R-D. Q. 135. From the three instances which were pointed out to you by Mr. Hale in his parallel column exhibit, were you able to form any reliable opinion about the origin of those three definitions? A. I should say no. I should like more time.

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R-D. Q. 136. Did you find any indications from those instances pointed out by Mr. Hale that the editor of the defendants' book did not use Webster? A. No.

R-D. Q. 137. That therefore did not shake your earlier opinion that the editor of defendants' book did use Webster? A. Not at all.

8069

Prof. John Carew Rolfe—Re-direct.

R-D. Q. 138. Have you looked at Defendants' Exhibit Imperial Dictionary by Ogilvie (handing)? A. No.

R-D. Q. 139. Please do so. A. (Witness does so.)

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R-D. Q. 140. If the statement upon the title page of that dictionary be true, namely, that it is on the basis of Webster's English dictionary, would you consider, that a book taken from that book was also based on Webster's English dictionary?

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MR. HALE: Objected to as incompetent, irrelevant and immaterial, as asking for a mere opinion and conclusion of the witness, and further because it is not shown that there is any connection between defendants' book and the English Ogilvie's Imperial Dictionary, but on the contrary Defendants' book is alleged to have been based directly upon Webster's dictionary and an attempt has been made to show that fact.

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MR. CARROLL: Defendants are not attempting to prove any origin or basis in the Ogilvie Imperial Dictionary but are simply attempting to ascertain more correctly what this witness means by "basis", it being counsel's opinion that the definition drawn from the witness by counsel for complainant was not his whole understanding of that word.

MR. HALE: The statement of counsel is objected to as leading.

A. Of course it depends on how he uses "On the basis of the English dictionary"; as it is ordinarily used it would justify me in using the title

Prof. John Carew Rolfe—Re-direct.

8073

"Webster's dictionary." That is, I could answer this question if I had read that title page to that extent; if that is the sense in which he uses it, I should say "yes" in answer to that question, but I should not say so without qualification for I would want to make an examination of the book.

R-D. Q. 141. Then it is your opinion that a book could be truthfully said to be based on Webster's English Dictionary if it came through a book like this based on Webster's English dictionary?

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MR. HALE: Objected to as leading and also as incompetent, because calling for a mere opinion.

A. If my first statement is correct as to my interpretation of "basis" so that this could be called the English Webster Dictionary, for instance, I should answer that question by "Yes"; but as I say, the uncertainty is as to the sense in which he uses the term "on the basis of."

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R-D. Q. 142. If, for example, the editor of this book in Webster's Illustrated dictionary had never seen Webster's 1847, but had compiled his book entirely from Ogilvie's Imperial dictionary and the result had been as it is in this book, such a large percentage of material identical with Webster, would you say that it was truthfully derived from or based on Webster's dictionary?

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MR. HALE: Objected to as incompetent, irrelevant and immaterial, as incorrectly assuming facts, and as calling for a mere guess or conjecture as to a state of facts which is not even claimed to exist.

MR. CARROLL: Defendants truly do not claim this state of facts to exist but are

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Prof. John Carew Rolfe—Re-cross.

merely attempting to find out precisely what the witness understands by the words "based on" or "derived from."

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A. I should not think it would be a natural thing to do at all, that is, if the title Webster was not given to the Imperial dictionary; it does not seem to me that that would be a natural thing, to term it "Webster" from the legal point of view; on the ethical point of view, I am sure, but from a literary point of view I should not myself use the title "Webster" under those circumstances.

R-D. Q. 143. But if the author of this book had stated that he had followed Webster, you would think that that was reasonable proof of the fact, would you not? A. That he had followed it?

R-D. Q. 144. Yes. A. Why, yes; I do not see why a man should make that statement unless he had actually followed it.

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R-D. Q. 145. And would that statement in your mind be corroborated by the internal evidence of the book?

MR. HALE: Objected to as irrelevant and immaterial; as leading and as calling for conjecture.

A. It would.

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RE-CROSS EXAMINATION by Mr. Hale:

R-X Q. 146. If a new dictionary was compiled to-day, using as its main sources Cassell's English dictionary, Chamber's English dictionary, and Ogilvie's English dictionary with more or less consultation of all other standard dictionaries, would it be in accordance with the rules and opinions

Francis M. Watrous—Direct.

8081

which you have declared to call such new book, "Webster's" dictionary? A. I should think not.

DEPOSITION CLOSED.
(Signature waived.)

Adjourned to tomorrow, Tuesday, October 29th, 1912, at two o'clock P. M.

8082

NEW YORK, October 29th, 1912.
2 o'clock P. M.

Met pursuant to adjournment.

Present: COUNSEL AS BEFORE.

FRANCIS M. WATROUS, called as a witness on behalf of the defendants in sur-rebuttal, being duly sworn, testified as follows:

8083

DIRECT EXAMINATION by Mr. Carroll:

Q. 1. Please state your age, residence and occupation? A. Twenty-five years of age; residence, 31 West 44th Street; student of law.

Q. 2. Have you made a count of the words marked on certain pages of complainant's parallel column exhibit offered in connection with the deposition of the witness Mawson? A. I have.

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Q. 3. More particularly have you counted the pages numbered 19 to 28 of that exhibit? A. I have, yes.

Q. 4. The witness Mawson in his testimony stated that from an analysis of these pages 19 to 28, and from an actual count of the words un-

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Francis M. Watrous—Direct.

derlined under various dictionaries appearing on these pages, there is matter in defendants' dictionary identical with Cassell's dictionary amounting to 61 per cent. Is that approximately correct? A. That is approximately correct.

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Q. 5. Did you verify the underlinings of Mr. Mawson or only count those words which were underlined by him? A. I verified the underlinings by him, Mr. Mawson, and found that they were correct.

Q. 6. I do not think you understand me.

MR. HALE: Ask another question, then.

Q. 7. Did you do anything more than count the words which Mr. Mawson had himself underlined? A. No, I did not.

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Q. 8. You did not therefore compare the pages which are cut from defendants' dictionary with the pages cut from Cassell's dictionary in order to see whether or not there might have been more words underlined than are actually identical?

MR. HALE: Objected to as an improper leading form of examination, as assuming a fact as to which no evidence whatever has been offered, namely, that the markings are not absolutely accurate.

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MR. CARROLL: The sole purpose of this question is to guard against an admission by this witness of the accuracy of the markings.

MR. HALE: The correct method of examining a witness in chief is to ask him what he did.

A. I did not.

Francis M. Watrous—Direct.

8089

Q. 9. Did you count the words underlined in the pages appearing in this exhibit cut from Chamber's dictionary? A. I did.

Q. 10. From your count, what percentage of words which appear underlined in this exhibit on the pages cut from Chamber's are identical with the defendants' dictionary? A. I found 40.39 per cent.

Q. 11. The witness Mawson stated that 49 per cent. of these pages cut from Chamber's were identical with defendants' dictionary. Was that correct? A. That was incorrect, Mr. Mawson's.

8090

Q. 12. Have you counted the words underlined on the pages cut from Webster's unabridged dictionary in the parallel column exhibit? A. I have.

Q. 13. Have you then computed what percentage of similar matter in defendants' dictionary these words formed? A. I have.

Q. 14. What percentage was that? A. I found 52.22 per cent.

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Q. 15. Have you also made a computation on pages 30 and 31 of the above mentioned parallel column exhibit? A. I have.

Q. 16. Did you first count the total number of words?

MR. HALE: I object to the leading form of examination.

Q. 17. Did you first count the total number of words appearing in defendants' dictionary at the left hand column? A. I did.

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Q. 18. Did you then count the words underlined in each of the other columns? A. I did.

Q. 19. And have you computed the percentages of words underlined in the six succeeding columns,

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Francis M. Watrous—Direct.

based upon the 100 per cent. of the total number of words in the first or defendants' column? A. I have.

Q. 20. What percentage of the total number of words in defendants' dictionary appearing on page 30 do the words underlined in Worcester on that page form? A. 38 per cent.

8094

Q. 21. And what percentage of the words from defendants' dictionary on page 31 do the words underlined in the matter taken from Worcester on that page form? A. 36.

Q. 22. And what is the average percentage of identity between defendants' dictionary and Worcester as is exemplified by these two pages? A. 37 per cent.

Q. 23. Have you made a similar count of the words underlined on page 30 in Annandale's concise dictionary? A. I have.

8095

Q. 24. What percentage of identity did that count show? A. 38.3.

Q. 25. And a similar count of the words underlined in Annandale's concise dictionary at page 31? A. 50.7.

Q. 26. What then is the average percentage of identity between defendants' dictionary and Annandale's dictionary as shown by these two pages? A. 44.5 per cent.

8096

Q. 27. Have you made a similar count of the words underlined in the matter taken from Stormonth's dictionary appearing on page 30? A. 19.8.

Q. 28. And the material from Stormonth on page 31? A. 45.2.

Q. 29. And what is the average per cent. for Stormonth? A. 32.5.

Q. 30. Have you made a similar count of the words underlined on page 30 in the column devoted to Nuttall? A. I have.

Q. 31. What is the percentage of identity as shown by that count? A. It is 26.4.

Q. 32. And on page 31 have you counted the words of Nuttall underlined? A. 44.6.

Q. 33. So that the average percentage of identity between Nuttall and the defendants' dictionary as shown by the matter on these two pages is what? A. 35.5.

Q. 34. Have you also made a similar count of the words underlined in the Student's Standard dictionary on page 30, and computed the percentage of these words as based upon the 100 per cent. of the total number of words in the defendants' dictionary? A. I have.

Q. 35. What percentage does that show? A. 16.6.

Q. 36. And of the words underlined in Student's Standard on page 31? A. 26.4.

Q. 37. So that if these markings be correct, the average percentage of identity between defendants' dictionary and the Student's Standard as shown by the matter given on these two pages, amounts to how much? A. 21.5.

Q. 38. Have you also made a count of the words on page 30, underlined in the column devoted to the Concise Oxford dictionary? A. I have.

Q. 39. What percentage of the words taken from defendants' dictionary do the words underlined in that column form? A. 10.2.

Q. 40. And a similar count for the Concise Oxford on page 31? A. 25.6.

Q. 41. So that the average identity between the words underlined in the Concise Oxford and the

8101

Francis M. Watrous—Direct.

material taken from defendants' dictionary as shown by these two pages, is how much? A. 17.9.

Q. 42. Have you also computed the general average of identities as shown on both these pages and in all the columns between the various dictionaries marked and defendants' dictionary? A. I have.

8102

Q. 43. How did you do this? A. I took the percentage,—I added all the percentages which we got from pages 30 and 31—all of the percentages of the words which we found in the complainant's columns and added them, and divided that by 6, the number of the dictionaries in the investigation.

Q. 44. What did the result show as to average percentage of identity between the dictionaries and defendants' dictionary? A. 31.49 per cent.

8103

Q. 45. The witness Mawson in his testimony stated that not one of the dictionaries which appear upon pages 30 and 31 is based on Webster. Have you compared the matter taken from Nuttall which appears on these two pages with Webster's 1847 edition?

MR. HALE: Objected to as incompetent, immaterial and irrelevant, and because defendants' book is in no way connected with Nuttall's dictionary.

8104

MR. CARROLL: This evidence is offered in rebuttal of Mr. Mawson's testimony, and is intended to prove that his statement that not one of these dictionaries is based on Webster's was unqualifiedly false.

MR. HALE: This witness has not shown himself possessed of knowledge to testify upon that subject.

Francis M. Watrous—Cross.

8105

MR. CARROLL: The witness will give no opinions, but simply a count from which the basis of the books will be apparent.

A. I have.

Q. 46. What percentage of the words which are given in the Nuttall column on page 30 are identical with the Webster's 1847? A. One hundred per cent.

Q. 47. What changes, if any, have been made in the column appearing on page 31 under the name "Nuttall" from the corresponding definitions in the Webster's 1847?

8106

MR. HALE: Objected to as incompetent, irrelevant and immaterial, and because defendants' book has been in no way connected with Nuttall's dictionary.

A. Under "teraph," Nuttall inserts the word "Penates." Under the word "terce" Nuttall inserts the word "part." Under "term" Nuttall inserts "a limited or set space of time." Under the word "terrace" Nuttall inserts "sloping sides and usually laid with turf."

8107

Q. 48. With these exceptions are the definitions appearing in the column devoted to Nuttall on page 31 identical with the definitions appearing in Webster's 1847 for the same word? A. Absolutely identical.

8108

CROSS EXAMINATION by Mr. Hale:

Q. 49. When did you make the counts upon which you have based your testimony to-day? A. I made them during this last week.

x Q. 50. When did you begin? Was it begun and ended within the last week? A. No, it was not. I can find out exactly if I have the date.

8109

Francis M. Watrous—Cross.

x Q. 51. Give it approximately? A. I should say a week ago Monday.

x Q. 52. And you finished when? A. Finished to-day.

x Q. 53. And have you worked all of that time upon these counts and calculations? A. I devoted a great deal of my time to that.

8110 x Q. 54. What proportion of your time in that period? A. I have been up very late nights working on that; once to two in the morning and once until three, and I should say about an average of between two and three hours a day.

x Q. 55. Where was the work done? A. It was done partly in the office and partly at my residence.

x Q. 56. You mean Mr. Carroll's office? Whose office? A. Gould & Wilkie's, yes.

8111 x Q. 57. On page 30 of this parallel column exhibit, how many words constitute the one hundred per cent upon which you based your calculations? A. Page 30, I based my calculations on the first page on two hundred and four words.

x Q. 58. What does that two hundred and four represent? A. Two hundred and four represents the number of words in defendants' dictionary on this page 30.

8112 x Q. 59. That is in the extreme left hand column of that page of the exhibit? A. In the extreme left hand column of that page of the exhibit.

x Q. 60. And all your percentages, referring to page 30, were based upon that number of two hundred and four, is that correct? A. Yes, sir.

x Q. 61. What was the number of underscored words you found in the column headed "Worcester" on this page 30 of this exhibit? A. Worcester; that was seventy-four.

Francis M. Watrous—Cross.

8113

x Q. 62. And how many words do you find, according to your count, in the column headed "An-nandale" upon this same page? A. I found seventy-eight.

x Q. 63. And in the column headed "Stor-month"? A. I found forty.

x Q. 64. And the column headed "Nuttall"? A. I found fifty-four.

x Q. 65. And the column headed "Student's Standard"? A. I found thirty-four.

8114

x Q. 66. And in the column headed "Concise Oxford"? A. I found twenty-one.

x Q. 67. And those were the figures used by you in calculating the percentages for that page? A. Yes, sir, those were the figures used by me.

x Q. 68. Now, what was the number of words constituting your one hundred percent in your testimony in regard to page 31 of this exhibit? A. One hundred percent was two hundred and thirty-one words.

8115

x Q. 69. That represents the total number of words in the extract from defendants' dictionary appearing upon the left hand column on page 31? A. Yes.

x Q. 71. All of the words in that column? A. Omitting, of course, the words which are defined; the words defined are not counted.

x Q. 72. In none of your calculations you counted the title word? A. In none of the calculations has the title been considered at all.

8116

x Q. 73. In other words, and respects, then, the one hundred percent includes every word in the matter taken from defendants' dictionary appearing in that extreme left hand column; is that correct? A. Yes.

x Q. 74. What was the number of underscored

Francis M. Watrous—Cross.

8117

words which you counted in the column headed "Worcester" on page 31 of this exhibit? A. I found eighty-eight.

x Q. 75. And Annandale's Concise? A. One hundred and seventeen.

x Q. 76. And Stormonth's? A. One hundred and four.

x Q. 77. And Nuttall's? A. One hundred and three.

8118

x Q. 78. And Student's Standard? A. Sixty-one.

x Q. 79. And Concise Oxford? A. Fifty-nine.

x Q. 80. Did you make any other counts or calculations in connection with this case in any manner whatever? A. No, no exact calculations; no.

x Q. 81. Did you make any other counts— A. By counts, do you mean numerical computations?

x Q. 82. Did you count anything in any connection in this suit? A. No, I did not.

5119

x Q. 83. You did not count the words of any other dictionary? A. No.

x Q. 84. Or any part of any other dictionary? A. No.

x Q. 85. Did you count the words in any part of Johnson's dictionary? A. Is that connected with this?

x Q. 86. Did you count the words in any part of Johnson's dictionary at any time? A. Not to my knowledge; no, sir.

8120

x Q. 87. You would know if you had, wouldn't you? A. Yes.

x Q. 88. Well, did you or didn't you? A. No, I did not.

x Q. 89. Did you count the words on any other pages of this parallel column exhibit or any part of it or any column of it than pages 31 and 30? A. No, I have not.

Francis M. Watrous—Cross.

8121

x Q. 90. In other words, you counted the underscored words upon pages 19 to 28 of this exhibit, and upon pages 30 and 31 of this exhibit? A. I did.

x Q. 91. And you counted nothing else in this exhibit? A. Nothing else.

x Q. 92. Is that correct? A. That was correct.

x Q. 93. Was that pursuant to any instructions of anybody? A. Why, yes.

x Q. 94. What instructions did you receive on that subject? A. I was instructed to figure out the percentages of words in the dictionaries given, such percentages to be compared with the—to see how near those percentages came to the number of words in defendants' dictionary.

8122

x Q. 95. Did you read Mr. Mawson's testimony? A. As contained in the—

x Q. 96. Any testimony that he gave in respect to it? A. I did not, no.

x Q. 97. You do not know then what Mr. Mawson testified, except as his figures are contained in this parallel column exhibit, is that correct? A. I do not.

8123

x Q. 98. And you saw no part of his testimony? A. No, sir.

x Q. 99. To make sure, please look at page 32 of this exhibit. Did you count anything upon that page or make any calculations? A. No.

x Q. 100. Why not? A. Because I didn't see it; didn't have it to do.

8124

x Q. 101. And did you personally make all the counts and all the calculations, or did you have assistance? A. I made the majority of them myself; I had some assistance.

x Q. 102. What did your assistants do, and who were they? A. Why, one of my assistants—assisted by Mr. Carroll.

8125

Francis M. Watrous—Cross.

x Q. 103. Did Mr. Carroll do some of the counting? A. He assisted me in figuring, yes.

x Q. 104. Did he do some of the counting? A. Yes, he did.

x Q. 105. What did he count? A. In the pages 30 and 31 the comparison of the six dictionaries and the defendants' dictionary, Mr. Carroll helped to figure out some of the percentages.

8126

x Q. 106. What did Mr. Carroll count?

MR. CARROLL: As a matter of fact, Mr. Carroll checked up everything from beginning to end.

A. What I am speaking from his personal knowledge, of course, and as far as that is concerned, that is all that I have definite knowledge of Mr. Carroll's having computed.

8127

x Q. 107. Did he count the words on pages 30 and 31 concerning which you have testified? A. Not to my knowledge, no.

x Q. 108. Did he bring in any figures for those pages? A. He brought me the figures which I had computed previously with two changes.

x Q. 109. You mean Mr. Carroll revised your figures? A. Yes.

x Q. 110. In any of your calculations, did you use any figures supplied by Mr. Carroll? A. No.

8128

x Q. 111. You personally counted every word that appears upon pages 30 and 31 upon which you have based any calculations? A. Absolutely.

x Q. 112. Did that yourself? A. Absolutely.

x Q. 113. Without any assistance? A. Yes.

x Q. 114. Did you make the arithmetical calculations yourself? A. Yes.

x Q. 115. Did you have any other assistance besides Mr. Carroll? A. None at all.

Francis M. Watrous—Cross.

8129

x Q. 116. Did Mr. Carroll make any count which you used in any way in connection with the other pages of this exhibit, that is, in the pages from 19 to 28, inclusive? A. In regard to pages 19 to 28 all that was done by myself.

x Q. 117. Without any assistance whatever? A. Without any assistance whatever.

x Q. 118. Please describe just what assistance Mr. Carroll gave you as to any part of this work?

8130

MR. CARROLL: Mr. Carroll is present and will make a statement of what he did.

MR. HALE: Complainant's counsel wishes it from the witness; he is examining the witness, and protests against any volunteered statements from counsel.

A. I told you a moment ago that Mr. Carroll assisted me in computing these percentages on pages 30 and 31.

8131

MR. CARROLL: A further continuation of this line of examination is objected to as purely irrelevant and immaterial, counsel for complainant having it entirely within his power to check up the figures, and the witness has already testified he made them absolutely alone.

x Q. 119. Assisted is a genneral word. I wish a statement that does not involve a conclusion, if you can make it? A. Well, in this case it really meant checking over.

8132

x Q. 120. Figures previously counted by you, is that what you mean? A. Yes, that is all the assistance amounted to.

x Q. 121. Did the percentages which you have

8133

Francis M. Watrous—Cross.

testified to, relating to pages 19 to 28 of this exhibit, refer to the percentage of defendants' book which can be identified in the various other books named, or the percentage of the various other books named which can be identified with the defendants' book? A. The percentage in the books named which may be identified with the defendants' book.

8134

x Q. 122. Which is the one hundred per cent. the defendants' book or one of the other books? A. The one hundred per cent. is the number of words in defendants' book.

x Q. 123. In every percentage that you have stated? A. In every case that normally is the number of words in the defendants' publication.

8135

x Q. 124. You have stated certain percentages relating to pages 19 to 28 of complainant's parallel column exhibit in connection with various dictionaries named. Please place upon the record the number of words in defendants' dictionary which constituted your one hundred per cent. and the number of words which you counted in the various other dictionaries named, to wit, "Webster's unabridged dictionary," "Chamber's dictionary" and "Cassell's dictionary"? A. On page 19 it is 186. Perhaps I should explain at this time about our taking a certain number of words. May I show you? These words here (indicating) marked with the violet, as you see, do not occur in Webster's; consequently in figuring the Webster percentages, we have taken out these words here which are marked in violet, which do not occur in Webster's. In computing the percentages of the other two books in which these words did occur, we have left them in, so that on each page there will appear two separate denominators.

8136

Francis M. Watrous—Cross.

8137

x Q. 125. In other words, you counted in matter in defendants' dictionary under a title or vocabulary in there that does not also occur in Webster's; is that correct? A. That is it, yes.

x Q. 126. You omitted those from your one hundred per cent.? A. Yes.

x Q. 127. Now proceed with your numbers, please. This is defendants' dictionary. That is, you are going to give the number of words on page 19 that come in defendants' dictionary? A. Yes. On page 19, defendants' 186; Webster, 69; Chambers, 42; Cassell, 92. And the second denominator is 150, from which Webster is computed.

8138

x Q. 128. That relates to defendants' book. Call it second denominator, relating to defendants' book. That is how much? A. 150. Page 19, percentages, Webster, 46, Chambers, 21, Cassell's, 49.5.

8139

Defendants'

	1st.	2nd.	Webster	Chambers	Cassell
P.	20	278	255	133	140
					174
Percentages			49.2	49.8	62.2

MR. HALE: I object to defendants' counsel interrupting the orderly examination of the witness and dictating the form of his answers.

8140

MR. CARROLL: Defendants' counsel has offered to adjourn and have it written out here in form so that it will be legible for the Court, the counts upon which this witness has based his percentages. There has been an objection to this by counsel for complainant, and in order to make the table

8141

Francis M. Watrous—Cross.

legible, the interruption by defendants' counsel has been necessary.

8142

MR. HALE: Defendants' counsel has had ample opportunity to prepare any tables he pleases. He also had an opportunity to put in such calculations as he pleased upon the direct examination of the witness. Complainant's counsel is entitled to an uninterrupted opportunity to cross examine the witness, and bring out such facts as are relevant to complainant's side of the case.

MR. CARROLL: What questions complainant's counsel might ask defendants' counsel had no knowledge of. The interruptions were necessary in order to have the matter correctly stated in the record.

x Q. 129. Please continue with your answer as to page 21?

8143

A.

Defendants'

8144

	1st.	2nd.	Webster	Chambers	Cassell
P. 21	292	275	128	138	185
Percentage			46.7	48.	63.6
P. 22	271	229	117	116	154
Percentage			51.8	42.	57.7
P. 23	208	153	74	87	117
Percentage			48.5	41.4	56.2
P. 24	290	249	152	125	180
Percentage			58.8	43.1	62.1
P. 25	292	270	130	105	199
Percentage			48.5	35.	67.5
P. 26	238	178	90	122	134
Percentage			52.6	51.2	56.4
P. 27	199	182	108	96	116
Percentage			59.5	48.3	57.9
P. 28	58	58	35	14	47
Percentage			60.6	24.1	81.3

x Q. 130. In calculating the Webster percentage I understood you to say that the figures under the name "Webster" in the table which you have just read upon the record were used as enumerators and the figures given under the term "second denominator" were used as the denominators?

A. As the denominators for all, Webster, yes.

x Q. 131. In all the others you used as the denominator the figures first given under the heading of defendants' book? A. That is correct.

8146

x Q. 132. In each instance, except the one on page 28, the second denominator was smaller than the first denominator? A. That is correct.

x Q. 133. And the use of the second denominator in calculating your Webster percentage made that percentage greater than it would have been if you had used the same denominator that you used in calculating the other percentage, is that correct? A. Correct.

8147

x Q. 134. The percentages then of the different books are calculated upon that different basis, is that correct? A. Yes.

x Q. 135. Upon what theory did you use the two different denominators in calculating the percentages? What was the reason for it? A. Because some of the words used in defendants' dictionary were not contained in Webster's.

x Q. 136. Was not the purpose of your calculations to ascertain what percentage of the defendants' entire book was contained in Webster, or was identical? A. That unfortunately is outside of my field; I have not done anything but computed.

8148

x Q. 137. According to instructions? A. And what the work was given me to do.

x Q. 138. Were you told to omit those words

8149

Francis M. Watrous—Cross.

which you did omit in defendants' dictionary in calculating your percentage with Webster? A. I was.

x Q. 138. The Webster percentage as given by you then does not represent the percentage of defendants' entire book as compared with Webster? A. No.

8150

x Q. 139. Did you compare the matter from Nuttall's dictionary which appears in the fifth column of page 30 of complainant's parallel column with Webster's 1847 edition? A. I did, yes.

x Q. 140. In your direct examination where you called attention to the changes between Nuttall's dictionary and the 1847 Webster's dictionary, did you state all the differences or variations which existed? A. All the differences or variations that I could find, yes.

8151

x Q. 141. Under the word "impulsion", that is the first word from the column of Nuttall's dictionary, on page 30 of Nuttall's dictionary, on page 30 of this exhibit, I do not find the following words which I read from the Webster's 1847 edition: "The sudden or momentary agency of a body in motion on another body." Why did you not call attention to that variation? A. Because the underlined words here are the ones which we are comparing with Nuttall; Webster includes a great many words; his definitions are more widespread, and there are many words in Webster's which Nuttall does not contain.

8152

x Q. 142. Your testimony then does not mean that Nuttall contains one hundred per cent. of Webster's matter under those words? A. Surely.

x Q. 143. (Question repeated) Your testimony then does not mean that Nuttall contains one

Francis M. Watrous—Cross.

8153

hundred per cent. of Webster's matter under those words? A. Shall I explain.

x Q. 144. Please explain? A. Nuttall contains one hundred per cent. Webster; everything in Nuttall is contained in Webster.

x Q. 145. But not everything in Webster is contained in Nuttall, is that what you mean? A. Webster is not nearly as abridged as Nuttall.

x Q. 146. Did you compare the underscoring of the words in the Nuttall column of this exhibit with the words in the corresponding definitions' of defendants' dictionary? 8154

MR. CARROLL: Objected to as irrelevant and immaterial.

A. No.

x Q. 147. You do not assert then that all of the matter underscored in Nuttall's column of this exhibit to indicate identity with corresponding definitions in the defendants' dictionary are not all the words that should be underscored? A. I have not investigated that matter at all. 8155

MR. HALE: That is all.

MR. CARROLL: That is all.

DEPOSITION CLOSED.
(Signature waived).

Adjourned to Wednesday, October 30th, 1912,
at two o'clock p. m. 8156

8157

Lauren Carroll—Direct.

NEW YORK, WEDNESDAY, OCTOBER 30TH, 1912.

2 o'clock P. M.

Met pursuant to adjournment.

Present: Counsel as before.

8158 LAUREN CARROLL, called as a witness on behalf of the defendants' in sur-rebuttal, being duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Carroll:

Q. 1. Name? A. Lauren Carroll.

Q. 2. Age? A. Mature.

Q. 3. Residence? A. 4 East 64th Street, New York City.

Q. 4. Occupation? A. Lawyer.

8159 The witness Mawson testified in answer to question 155 that page 32 of his parallel column exhibit proved that "The British Empire Dictionary contains between 49 per cent. and 50 per cent. of matter traceable to Johnson's dictionary in so far as the definitions are common to both books. By traceable I mean the language is identical." I have counted the words which appear in the column taken from the British Empire Dictionary on page 32, complainant's parallel column exhibit, and find that the words used in the definitions in that column number 157. There are 61 words marked as identical with Johnson. This gives a percentage of 39.5 per cent. instead of 50 per cent. of identity.

8160

I have also counted the words in defendants' dictionary as given on page 32 of complainant's parallel column exhibit, and find them to be 95 in number. I have also counted the words which are identical with Webster in this column as given

Lauren Carroll—Direct.

8161

on page 32 of said exhibit. The words in the matter taken from defendants' dictionary that are identical with Webster on said page 32 are 54 in number, which gives a percentage of identity between defendants' dictionary and Webster, so far as the matter contained on this page is concerned, amounting to 57 per cent. Every word which is marked in defendants' dictionary on said page 32 as being identical with Johnson's is also included in the definitions appearing on the page cut from Webster, with the exception of the one word "disproof", which may be considered an abbreviation of the following words used by Webster in his definitions: "Disproved," used twice, "disproving", and "to disprove". The following words are identical between defendants' dictionary and Webster's, and do not appear at all in Johnson's: Under "confraternity", the word "society". Under "confuse", "to disconcert", also "to render indistinct". Under "confute", "to prove to be false or invalid". All of these words are used in defendants' book in the definitions, and none of them appear in Johnson's. Also in defendants' definition of "conger", the adjective "large" is used. Webster also uses said adjective, and describes the animal at length. Johnson defines it merely as "the sea-eel".

8162

8163

A fair example of paraphrase which was not included in the percentage of identity between defendants' book and Webster will be found under the word "confuse". The two meanings given in defendants' definition, "to mingle, to jumble up", seem clearly to be paraphrased from the first two definitions given in Webster's. Similar meanings do not appear in Johnson's.

8164

On page 19 of complainant's parallel column exhibit, the witness Mawson should have under-

8165

Lauren Carroll—Cross.

lined in Webster's unabridged dictionary, and would have thereby increased the percentage of identity allowed between defendants' book and Webster's, the words "teraphim", "household deities or images" because the words are given in defendants' dictionary as follows: "Teraphim, household god or image." In this same definition Webster also gives "Heb.", an abbreviation for Hebrew. This should have been underlined for the reason that the word "Hebrews" appears in defendants' dictionary. This may seem of small moment, but inasmuch as there are only 158 words in defendants' book appearing on this page, the four or five words mentioned will make a difference in percentage of identity of three or four percent.

8166

I have not personally run through the other pages of this exhibit, and so cannot testify as to whether or not there are other similar mistakes in the other pages, and I do not testify on that subject one way or the other. This one mistake I came upon quite by chance.

S167

CROSS EXAMINATION by Mr. Hale:

x Q. 5. You have spoken of a count of identical words upon page 32 of this exhibit, and have calculated certain percentages. Did you follow Mr. Mawson's markings on that exhibit as indicating the identities? If not, what did you do? A. In computing the percentage of identity between the British Empire Dictionary and Johnson's I followed Mr. Mawson's markings. Mr. Mawson, however, had not marked identities between defendants' book and Webster's, so that there was nothing to follow in that particular.

8.68

x Q. 6. So you made a new count for yourself of defendants' book as compared with the Web-

ster's, appearing upon page 32 of this exhibit, in order to calculate said percentage? A. Not precisely. I had previously verified the words underlined by Mr. Mawson in defendant's book on page 32. These words were underlined by Mr. Mawson to indicate that they were identical with Johnson's. I found that each one of these words was also contained in Webster's, so that the count included these words, and also the words which I have already testified appear in Webster's, and do not appear in Johnson's.

8170

x Q. 7. But you in no way criticise Mr. Mawson's markings, underlinings and so forth upon page 32 of this exhibit? A. No.

x Q. 8. And so far as you know those markings are accurately made for the purpose for which he made them? A. So far as I know.

x Q. 9. You gave a list of certain words which you stated were in defendants' book and which were identical with Webster's, which do not appear in Johnson's, and made the remark that "all of these words appear in Webster and not in Johnson." Just what did you mean by that remark? A. I meant that no basis for these words or definitions can be found in Johnson, but that they are undoubtedly taken from Webster.

8171

x Q. 10. Because contained in Webster and not in Johnson, is that what you mean? A. That is the natural inference.

x Q. 11. Do you know whether or not any of these words appear in Cassell's dictionary? A. I do not.

8172

x Q. 12. You did not examine to see? A. I did not.

x Q. 13. Do you know whether they appear in any of the other dictionaries mentioned in this

8173

Lauren Carroll—Cross.

exhibit, and referred to by Mr. Mawson? That is to say, either Cassell's, Chambers, Ogilvie's, Nuttall's, and Stormonth's, Annandale's, Worcester's, Student's Standard, and Concise Oxford?

A. I have not got these books in my possession, and the matter appearing on page 32 of this exhibit which might perhaps have been found in part in some or other of the dictionaries named is not included in the other pages of the exhibit.

8174 Moreover I considered it immaterial, and therefore did not compare.

x Q. 14. I presume the principle which you have announced with special reference to Johnson would apply to all other dictionaries, with which defendants' book might be compared with equal validity? A. I have enunciated no principle.

8175 x Q. 15. If, for example, it should be found that defendants' dictionary contains in its definitions words identical with words found in Webster's corresponding definitions, and also that the same definitions in defendants' book contain words or other matter not contained in Webster's, but contained in some of these other dictionaries such as Cassell's or Chambers, would not that indicate or be a natural inference, to use your own phrase, that these other dictionaries had been used in the compilation of defendants' book? A. I understand that defendants' book states upon its title page that it is revised in accordance with the most recent English and American authorities, and I
8176 suppose that where words or definitions are not contained in Webster's dictionary, the editor of defendants' dictionary went to some other source.

MR. HALE: The answer is objected to as not responsive. Will you please repeat the question once more?

Lauren Carroll—Cross.

8177

(Question repeated by the stenographer.)

THE WITNESS: I gave no opinion on that matter before.

x Q. 16. You have stated in substance that it was an indication that Webster rather than Johnson had been used in the case of certain definitions in defendants' book, because those definitions contained words which were in Webster and not in Johnson. Why would that not be a valid rule for determining whether or not defendants' definitions were derived from other dictionaries, such as Cassell's or Chamber's dictionaries, where a similar state of facts exists? A. Please read the answer to which you refer.

8178

(Question and answer referred to read by the stenographer.)

THE WITNESS: Whatever rule counsel for complainant can derive from my earlier answer may be applied to the present question.

8179

x Q. 17. You have given evidence purporting to show that Webster's dictionary of 1847 was used in the compilation of defendants' dictionary. Do you mean to assert that defendants' dictionary was not directly copied in a very large part and to the extent of more than 90 per cent. from the British Empire dictionary, which is an exhibit in this case? A. That part of Mawson's testimony I have not gone into on my direct examination, and I therefore decline to answer that question.

8180

x Q. 18. Your testimony was on the subject matter of the words and origin of the literary matter contained in defendants' book. This question is precisely limited to that exact subject matter.

8181

Lauren Carroll—Cross.

The question is therefore repeated? A. I gave no opinion whatever in my direct examination as to the source or origin of defendants' book. I simply was correcting mistakes made by Mr. Mawson.

x Q. 19. Have you to any extent compared defendants' dictionary with the British Empire dictionary? A. No.

8182

x Q. 20. None whatever? A. Not to any extent.

x Q. 21. Just what do you mean by that? A. Exactly what I say.

x Q. 22. You made no comparison whatever? Is that what you mean to say? A. I have already answered that question, and inasmuch as this testimony must be printed by next Monday, I decline to answer it further.

DEPOSITION CLOSED.

8183

(Signature waived.)

8184

IT IS HEREBY STIPULATED between the parties hereto that the affidavits of C. O. Sylvester Mawson and of Helen Winifred Haskins, verified respectively upon the 18th day of October, 1912, giving the result of a count made by said affiants as therein stated, of matter in defendants' dictionary and of matter in the British Empire dictionary, shall be here inserted and deemed a deposition on behalf of the complainant, with the same force and effect as if the witnesses had been regularly called and examined by way of question and answer, the purpose of these affidavits being to correct

Lauren Carroll—Cross.

8185

certain errors pointed out in the previous counts appearing in the tables on pages 517 and 519 of complainant's printed record.

DEFENDANTS' TESTIMONY CLOSED.

(Printing of notice and of Examiner's certificate omitted by consent.)

8186

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8189

DISTRICT COURT OF THE UNITED
STATES,

SOUTHERN DISTRICT OF NEW YORK.

G. & C. MERRIAM COMPANY,
Complainant,*vs.*

8190

CUPPLES & LEON CO.,
Defendant.Equity No. 8-
161.G. & C. MERRIAM COMPANY,
Complainant,*vs.*

8191

THE SYNDICATE PUBLISHING COM-
PANY,
Defendant.Equity No. 8-
162.UNITED STATES OF AMERICA,
STATE OF MASSACHUSETTS,
County of Hampden,

} ss.:

8192 C. O. SYLVESTER MAWSON, being first duly
sworn, deposes and says:—

I am the C. O. Sylvester Mawson who testified in the above entitled cause in behalf of the complainant. In the course of that testimony I compared defendant's dictionary with the British Empire Dictionary, which I termed Price's Dictionary from the name of its author, with a view to showing the extent of identity between them, and

I presented the result of a count of the terms and definitions contained in those respective dictionaries in the form of tabular summaries, and the same appears in complainant's printed record upon pages 517 and 519 respectively. 8193

Subsequently I was informed by complainant's counsel that defendant claimed that my count was materially incorrect, and that defendant had obtained leave to reopen the case and take further testimony in rebuttal, partly for the purpose of correcting my count. Thereupon, at the request of complainant's counsel, I caused a new count to be made under my supervision by Miss Helen Winifred Haskins. This new count was carefully checked with my original count and in case of discrepancies between the two, the work was gone over two or three times. After this counting and checking was completed, I tested the figures of Miss Haskins at various points to make sure of accuracy, and I found the same correct. The figures resulting from the new count, made as aforesaid, together with the corresponding figures in my original count, are embodied in the following tables, which are correct to the best of my information and belief. 8194 8195

ANALYSIS

OF PRICE'S DICTIONARY AND WEBSTER'S NEW CENTURY DICTIONARY.

(Comparison of *Old* and *Revised* Figures.)

TERMS:

No. of Terms in Price			Terms Common to PRICE & W. N. C. D.		Terms in PRICE not in W. N. C. D.		Terms in W. N. C. D. and not in Price.	
New Count	Old Count		New Count	Old Count	New Count	Old Count	New Count	Old Count
A	3531	3875	2428	2941	1103	934	40	40
B	2418	2291	1992	1900	426	391	13	13
C	4270	4339	3051	3006	1219	1333	27	27
D	2129	2106	1701	1697	428	409	6	6
E	1507	1493	1273	1268	234	225	7	7
F	1761	1765	1461	1459	300	306	10	10
G	1414	1407	1105	1103	309	304	8	8
H	1423	1424	1122	1120	301	304	19	19
I	1640	1631	1408	1407	232	224	5	5
J	278	276	203	203	75	73	4	4
K	266	265	183	182	83	83	1	1
L	1106	1100	873	872	233	228	17	17
M	1787	1785	1481	1469	306	316	25	25
N	641	641	515	515	126	126	2	2
O	766	765	625	624	141	141	19	19
P	2962	2954	2425	2417	537	537	39	39
Q	216	216	179	179	37	37	0	0
R	1562	1557	1402	1400	160	157	12	12
S	3680	3665	3191	3185	489	480	35	35
T	1767	1758	1568	1564	199	194	17	17
U	235	235	199	199	36	36	2	2
V	619	612	543	543	76	69	4	4
W	624	626	576	576	48	50	6	6
X	36	36	31	31	5	5	2	2
Y	103	103	88	88	15	15	1	1
Z	125	213	94	182	31	31	2	2
36866		37138	29717	30130	7149	7008	323	323

DEFINITIONS.

<i>Dissimilar Definitions.</i> More or Less Resembling PRICE			Containing Senses Not Covered in PRICE.		<i>Identical Definitions.</i> In PRICE and W. N. C. D.	
<i>New Count</i>	<i>Old Count</i>		<i>New Count</i>	<i>Old Count</i>	<i>New Count</i>	<i>Old Count</i>
A	21	21	8	8	2399	2912
B	4	4	6	6	1982	1890
C	18	15	5	4	3028	2987
D	8	8	5	5	1688	1684
E	6	6	5	5	1262	1257
F	13	13	17	17	1431	1429
G	4	4	3	2	1098	1097
H	4	4	4	3	1114	1113
I	17	17	4	4	1387	1386
J	1	1	8	8	194	194
K	4	4	4	4	175	174
L	9	9	10	10	854	853
M	16	16	17	18	1448	1435
N	11	11	11	11	493	493
O	2	2	11	11	612	611
P	29	29	26	26	2370	2362
Q	0	0	2	2	177	177
R	17	17	16	16	1369	1367
S	33	34	36	36	3122	3115
T	42	42	41	40	1485	1482
U	5	4	3	3	191	192
V	11	11	6	6	526	526
W	13	13	17	17	546	546
X	0	0	0	0	31	31
Y	0	0	4	4	84	84
Z	2	2	0	0	92	180
290	287		269	266	29158	29577

8205

SUMMARY.

COMPARISON OF OLD AND REVISED FIGURES.
Terms.

	Revised Figures	Old Figures
Number of terms common to W. N. C. D. and Price.....	29,717	30,130
Number of Price's terms not in W. N. C. D.....	7,149	7,008
8206 Total number of terms in Price	<hr/> 36,866	<hr/> 37,138
Number of terms common to both Price and W. N. C. D..	29,717	30,130
Number of terms in W. N. C. D. and not in Price.....	323	323
8207 Total number of terms in W. N. C. D.....	<hr/> 30,040	<hr/> 30,453
Percentage of terms in W. N. C. D. also appearing in Price	98.92	98.94
Percentage of terms in W. N. C. D. not appearing in Price	1.08	1.06
8208	<hr/> 100.00%	<hr/> 100.00%

DEFINITIONS.

	Revised Figures	Old Figures
Number of definitions identi- cal with Price.....	29,158	29,577

Number more or less resembling Price (some having only a single word changed)	290	287	8209
Number containing new matter	269	266	
Number of new terms defined. .	323	323	
	<hr/>	<hr/>	
	30,040	30,453	

Percentage of definitions similar to Price.....	98.02	98.06	
(viz. identical definitions more or less resembling	97.06 (97.12)	(.96) (.94)	8210
	<hr/>	<hr/>	
	98.02	98.06	

Percentage of matter in W. N. C. D. not contained in Price	1.98	1.94	
	<hr/>	<hr/>	
	100.00%	100.00%	

It will be noted that the results of the new count are not materially different from the former count as already contained at pages 517 and 519 in the record. Such errors as crept into the original count were wholly inadvertent and were due, as I have ascertained, mainly to unskilful use of an adding machine by one unaccustomed to its manipulation. The errors, such as they were, largely offset each other, as will appear from the figures in the tables hereinbefore contained. The net result of the new count shows a variation of only one-fiftieth (1/50th) of one per cent. (1%) in the percentage of "terms in W. N. C. D. also appearing in Price" (viz.: new figures, 98.92%; old figures, 98.94%); and in the percentage of "terms in W. N. C. D. not appearing in Price" the variation is the same (viz.: new figures, 1.98%; old figures, 1.06%); in the percentage of "Definitions Similar to Price," the variation between the old

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8213 and the new figures is only one-twenty-fifth (1/25th) of one per cent. (1%) (viz., new figures, 98.02%; old figures, 98.06%); in the percentage of "matter in W. U. C. D. *not contained in Price*" the variation is also one-twenty-fifth (1/25th) of one per cent. (1%), (viz., new figures, 1.98%; old figures, 1.94%).

I was instructed that this count and these figures must be absolutely correct, and I believe that they are so, as far as humanly possible to make them. The books and figures, of course, speak for themselves.

C. O. SYLVESTER MAWSON.

Subscribed and sworn to before me }
this 18th day of October, 1912. }

CHARLES S. CLEAVES,
(SEAL) Notary Public,
Springfield, Massachusetts.

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DISTRICT COURT

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OF THE UNITED STATES.

SOUTHERN DISTRICT OF NEW YORK.

G. & C. MERRIAM COMPANY,
Complainant,

vs.

CUPPLES & LEON Co.,
Defendant.

Equity No.
8-161.

8218

G. & C. MERRIAM COMPANY,
Complainant,

vs.

THE SYNDICATE PUBLISHING
COMPANY,
Defendant.

Equity No.
8-162.

8219

UNITED STATES OF AMERICA, }
State of Massachusetts, } ss.:
County of Hampden.

HELEN WINIFRED HASKINS, being first duly sworn, deposes and says: 8220

I am a stenographer employed by G. & C. Merriam Company, complainant in the above entitled cause. I have read the foregoing affidavit of C. O. Sylvester Mawson, verified the 18th day of October, 1912, and know the contents thereof, and the same is true except so far as matters are therein

- 8221 stated to be alleged upon information and belief, and as to those matters I believe it to be true. I carefully counted the terms and definitions as contained in the two dictionaries filed as exhibits and referred to by Mr. Mawson, and obtained the results contained in the table which is made a part of Mr. Mawson's foregoing affidavit, which figures appear in the column headed "New Count." I exercised the greatest care in counting and adding these figures, and I believe them to be absolutely correct.
- 8222

HELEN WINIFRED HASKINS.

Subscribed and sworn to before me)
this 18th day of October, 1912. }

CHARLES S. CLEAVES,
(SEAL) Notary Public,
Springfield, Massachusetts.

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Opinion of Judge Hand on Final Hearing.

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UNITED STATES DISTRICT COURT,**SOUTHERN DISTRICT OF NEW YORK.****G. & C. MERRIAM COMPANY,****VS.****SYNDICATE PUBLISHING COMPANY.****E 8-162.****8226****G. & C. MERRIAM COMPANY,****VS.****CUPPLES & LEON COMPANY.****E 8-161.**

These are two suits in equity to secure an injunction and accounting against the defendants for the publication of two certain dictionaries, one under the title of "Webster's New Standard Dictionary," published by the Syndicate Company, and the other under the title of "Webster's New Century Dictionary," published by the Cupples & Leon Company. Each of these books is substantially taken from the same plates and the differences between them are few, though the "Century" has been less changed than the "Standard." They are each printed from a dictionary entitled "The Crown Dictionary," the origin of which is one of the points of dispute in the case.

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The complainant has since 1847 continuously published dictionaries which were either themselves revisions, abridgments or reductions of the work of Noah Webster, the well-known lexicographer, or of previous revisions of that work. The chief editions were published in 1847, 1864, 1890 and 1909. The theory of the suits is, that the

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8229 *Opinion of Judge Hand on Final Hearing.*

name "Webster," when applied to a dictionary at the present time, signifies to buyers throughout the country that the work is a compilation or abridgment published by the complainant company, which is either known by name, as the publisher, or whose identity is established in popular opinion as the publisher for many years singly responsible for all Webster's dictionaries. These suits were commenced in November, 1911. In October of that year the defendant, Syndicate Company, informed the complainant that there would be thereafter inserted in the title page the statement which had been required by the decree of the Circuit Court of Appeals for the First Circuit in a similar case against one Ogilvie, and that on the back of the dictionary would appear the name of the Syndicate Company. The defendant, Cupples & Leon Company, inserted the statement upon the title page early in November, 1911, and so informed the complainant; it had always, with one exception, printed its name on the back. The complainant not being satisfied with these concessions, brought this suit.

WILLIAM B. HALE, for the complainant.

HUGH A. BAYNE and HARRY D. NIMS for the defendants.

8232 HAND, *D.J.*: The complainant has never succeeded in getting from any court a decree which would forbid the publication of a "genuine" Webster dictionary in the form in which the defendants were selling theirs at the time these suits were started. The defendants had not only conformed in every way to the terms of the decree in the case of Merriam v. Ogilvie, as it was finally entered, but they had advised the complainant of their submission to the law as there laid down and of their purpose in future to adhere to it.

Opinion of Judge Hand on Final Hearing. 8233

The complainant brings this suit upon the theory that the book published (for the two books are nearly identical in content) is in fact not based upon Webster's dictionary at all, that it has no right to be called Webster's Dictionary in any sense, and that it is a fraud to call it such. Indeed, they do not concede that anyone has any right but themselves to use the word "Webster's" upon a dictionary, unless it be one of the original dictionaries published by Webster himself, and even in that case they insist that it must be distinguished by the statement that it is one of the original Webster's dictionaries, a fact which would probably destroy any possibility of its sale anyway. Their pretention extends even to the point of forbidding the sale of any dictionary honestly compiled upon Webster's original sources, since they assert that the name "Webster," when applied to any such compilation or abridgment, necessarily implies their own responsible supervision and authorship. I have not, however, the least doubt at the outset in overruling so extreme an assertion as this. It is quite clear that any honest compilation or abridgment at the present time of Webster's work is entitled to describe itself as such and that the most which the complainant's supposed right could in any case do, would be adequately to indicate that a work so described was not a compilation or abridgment by the original publishers of Webster's Dictionary or their successors. Indeed, it is a preposterous assertion to say that the name "Webster's" as at present used by the complainants themselves does not indicate to the public mind that their work has some connection with Webster's original work other than that they choose to publish it, or that it need not be the result of a legitimate literary descent from his original. In other words, even though the word indicates *prima facie* that the

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8237 *Opinion of Judge Hand on Final Hearing.*

book is the complainant's compilation, it also still indicates that it is a compilation with Webster as its original source, and it is in this sense that Judge C'oxe spoke when he said that the word had two meanings, a proprietary and a descriptive. Nor is there any inconsistency in such a dual meaning; the word may mean "Merriam's compilation from Webster," quite as well as "Merriam's Com-

8238 pilation." If it does, it must as well answer to one part of its definition as to another; in short, it must be a compilation from Webster, or it is a fraud. I pay not the least attention to those witnesses who say that it means only "Merriam's Compilation." If the name "Webster" has this descriptive significance, it is quite clear that it will also honestly describe any actual compilation from any one of Webster's dictionaries, provided that some suffix be added to distinguish the compilation from Merriams. The word need not by any means

8239 be confined to the original work of Webster himself. Indeed, the only authority which has ever independently given the complainant any trade rights in the name, "Webster," itself refused absolutely to forbid the defendant from using the name upon what was in every sense a compilation. In *Merriam v. Ogilvie*, 149 Fed. R., 860, Judge Colt says that Ogilvie's work was an enlarged and revised edition of the Webster of 1847. Now the edition of 1847 was not by any means a Simon-pure

8240 Webster, for its title page asserts that although it contained the whole vocabulary of the first edition in two volumes, the entire corrections and improvements of the second edition (both by Noah Webster), it had been revised and enlarged by Chauncey A. Goodrich. Just what the abridgment from two volumes to one involved and just what was the revision and enlargement of Goodrich which accompanied the abridgment added does not appear, but it does appear that the work which the

Opinion of Judge Hand on Final Hearing.

824E

Circuit Court of Appeals of the First Circuit permitted to bear the name "Webster" had passed through two revisions of one sort or another, and this is enough to dispose of the assertion that the only work which may be called "Webster" is some book just as it left the hands of Noah Webster.

The first question, therefore, which arises is, whether the dictionary in question was based upon Webster's original work in such sense that it is entitled to be known by that name. In the solution of this question I am not disposed to enter into any nice considerations of a literary character, such, for example, as Professor Peck suggests, as to what creates a Webster's dictionary. For it is quite clear that whatever scholars may think, the public generally—and it is the public with whom we are now concerned—mean something else by the words in question. What is it that they do mean, either by a Webster's Dictionary or a dictionary based upon Webster's? It seems to me that they mean the way the book has been made up more than its present contents, its history rather than its present identity with its source. The word at least denotes what I should call literary descent from Webster's original books; that is, that each book in the series of which this is the last, was made up by its author with its predecessor before him, only changing the spelling, definition, vocabulary and the rest as his opinions, and learning, indicated to him that changes were required to adapt the book to the present; and that this succession goes back without break to some work by Webster himself. Nor is it indeed possible for the complainant to take any other position than this without putting themselves in the position of foisting upon the public a spurious work. Their own last edition, that of 1909, is a book of almost totally different literary contents from any book with which Noah

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8245 *Opinion of Judge Hand on Final Hearing.*

Webster had anything to do. They have the alternative of accepting the definition of "Webster" as indicating this kind of descent, or of maintaining that "Webster" means any work of theirs and has no descriptive significance whatever. Otherwise they are within the rule in the California Fig Syrup case. Of course, a "Webster" dictionary must own Webster as its father originally; and in the case at bar, although the heredity of the complainants' 1909 Webster is all that gives it its character as a Webster, yet it still has that character, remote now as the content may be. The complainant is in no position to deny a purely descriptive use of the word to any other dictionary which is as legitimate as its own. The constant iteration that all such are "bogus," or not "genuine," is merely a childish extravagance.

Now does the defendants' book answer this description as well as the complainant's? The complainant has established beyond any question, in my judgment, that the immediate basis of the Crown Dictionary was the British Empire Dictionary, which has been put in evidence in this case, and which was edited by the Rev. E. D. Price, F. G. S. The proof of this consists in the identity of the literary matter between the two, which is so great as to be substantially identical. The parties in taking testimony have proceeded upon the assumption that the kinship between dictionaries may be ascertained by examining the verbal identities in the contents. Thus, at what must have been an appalling labor they have each prepared tables showing the identity of subject matter between the defendants' book and others. It so happens under the complainant's table, that of all those examined the closest in content to the British Empire Dictionary is Ogilvie's Imperial Dictionary of 1883. The similarity of contents extends to 70% of literal identity; that is to say,

70% of the contents of the British Empire Dictionary appears verbatim in the Imperial. The identity in the case of the Concise Oxford is only 28% and of what I am tempted to call the non-Websterian group, ranges from there to about 40%. Considering the difference in time of their appearance this identity with the Imperial is adequate *prima facie* proof that the former is the literary descendant of the other, and in the absence of contradiction, justifies me in so assuming, when compared with the extremely low percentages of the other more or less contemporaneous works. Certainly one who advertises that work as a Webster which has scarcely any of Webster's matter within its covers cannot afford to be too meticulous. It also so happens that the first edition of the Imperial Dictionary published in 1850 is in evidence written by the well-known lexicographer, John Ogilvie. The title page of this work says that it is "On the basis of Webster's English Dictionary," while the preface, dated December, 1849, more fully states the sources. Thus, on page III of this preface appears the following: "In adopting Webster's dictionary as the basis of the Imperial dictionary, the great object of the editor in preparing the latter has been to correct what was wrong and to supply what was wanting in Webster in order to adapt the new work to the present state of literature, science and art. Accordingly, every page of Webster has been subjected to careful examination, numerous alterations and amendations have been made, a vast number of articles have been re-written, very many of Webster's explanations of important terms have been enlarged and many new and correct definitions of others given; new senses have been added to old words where they were found wanting, and a multitude of new words and terms have been introduced, especially in the scien-

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8253 *Opinion of Judge Hand on Final Hearing.*

tific and technological departments, so that to Webster's addition of twelve thousand to Todd's Johnson, a further addition has been made of at least fifteen thousand words and terms."

- 8254 Now that is exactly what I think the public means by a "Webster" brought up to the time of its publication, and it is in exactly this sense, and only in this sense, that the complainant has any right to continue to call its present dictionaries "Webster's," whether or not it indicates the complainant's own compilations when not accompanied by any suffix. Certainly Ogilvie could have called the Imperial Dictionary either "Ogilvie's Webster" or the "Imperial Webster," or any other kind of "Webster" that he wished. The successive editions certainly were Webster dictionaries and so were any smaller works, derived from those editions, whether abridgments, condensations, or the like. Nor does it seem to me to
- 8255 matter that the intermediate sources did not go by the name Webster. Here, for example, is a work which comes down by precisely the same kind of line of descent from Webster that the complainant's present abridgments come, each individual in the line being formed from its predecessor by some accretion, some elimination, some amendment, till one reaches the work of Webster himself. When the public uses "Webster" does it understand that all the intermediate steps shall
- 8256 have been so named? I hardly think so. Rather, it seems to me, it is the fact of its unbroken descent that the word implies. Rolfe, a concededly fair witness, was asked his opinion upon this question, and, while I should not feel in the least bound by it, I should be very glad to give it weight, if I could understand what he meant by his answers: He says it would justify the use of the title "Webster's dictionary" if the book were taken from Ogilvie; that is if Ogilvie could

Opinion of Judge Hand on Final Hearing. 8257

be called an English Webster, but that though justifiable it was not a natural thing to do, and that he, personally, from a literary point of view, should not use it. So far as this means anything, it is that in the witness' opinion the name could honestly be used. Therefore, I believe that the defendants have shown that their dictionary is really a Webster entitled to be so called quite as much as the Ogilvie's in the suit of *Merriam v. Ogilvie*. Are the statements in Ogilvie's preface competent as evidence? 8258

Ogilvie's preface is of course an unsworn statement, and as such only hearsay testimony, which may be admitted only as an exception to the general rule. The question is whether there is such an exception. I have been unable to find any express authority in point and must decide the question upon principle. In the first place, I think it fair to insist that to reject such a statement is to refuse evidence about the truth of which no reasonable person should have any doubt whatever, because it fulfills both the requisites of an exception of the Hearsay Rule, Necessity and Circumstantial Guarantee of Trustworthiness, Wigmore, Secs. 1421, 1422, 1690. As to Necessity, it is a statement made by a man now dead about his own conduct in the compilation of his own work. I say he is dead because he had completed a large dictionary some sixty-three years ago, and it is a fair presumption that he was at least thirty-seven years old when the work appeared. Moreover, the Dictionary of National Biography, which is certainly the standard work upon the subject, gives the date of his death as 1867. Besides Ogilvie, everyone else is dead who ever knew anything about the matter and could intelligently tell us what the fact is. It is true that internal evidence remains, but this very case shows that it is hard to be 8259 8260

8261 *Opinion of Judge Hand on Final Hearing.*

certain in one's inferences from it. If this be not evidence I can see no way of getting any better, and the fact cannot be established at all. Surely the law is not so unreasonable as that.

As to the Trustworthiness of the testimony, it has the guarantee of the occasion, at which there was no motive for fabrication. A claim of originality might be suspicious, but one of obligation is not. Whether Ogilvie claimed as his
8262 source Johnson or Webster, was not a matter which he would be likely to misstate. Ogilvie was a lexicographer of note and the "Imperial Dictionary" was for long one of the standards of English speech, and there is in reason every ground for accepting as presumptively true a statement of this kind made at this time and place. The evidence is not conclusive as matter of law, a circumstance which many judges seem to forget in discussing the dangers of unsworn
8263 testimony. Ogilvie may of course have been a malingerer; he may have been employed by unscrupulous publishers to assert a derivation which was untrue, but such considerations would operate to exclude nearly all testimony ever given in a court of law.

In spite of these considerations, however, if there be any absolute rule of law that forbids such proof, I may not regard it, whether or not I like the results. Now it is perfectly well settled that
8264 courts will use dictionaries and other reliable works of reference as occasion may require, *Brown v. Piper*, 91 U. S., 37; *Nix v. Hedden*, 149 U. S., 304; *Western Assurance Co. v. Mohlman Co.*, 83 Fed. R., 811 (C. C. A., 2nd Cir.); *Koechle v. U. S.*, 84 Fed. R., 448 (C. C. A., 2nd Cir.). They are accepted because the circumstances attending their preparations guarantee their reliability, but they remain none the less unsworn statements of fact or opinion. In the case at bar, Ogilvie's

definitions and spellings, which are only his opinions as to what English usage then permitted, would certainly be accepted in any court, and the only way in which I can rationally exclude his statement of the sources from which those opinions proceeded, is by finding some ground in reason for distrusting the one which does not apply to the other. There is no such ground, and the admissibility of the work as a reliable authority must carry with it the explanatory portions. It may be that on authority a statement quite disconnected with the book's substance would not go in, irrational though that result might be. Thus if Ogilvie had put in his preface that he married at the age of thirty, authority might rule it out, but if the law admits his learned opinions at all, it would, in my judgment, be quite absurd to refuse also to admit his statement about their derivation. That one should admit his conclusions as reliable, but not his statements of the means by which he reached them, is more of a strain than the law of evidence can carry. 8266

The attitude of the Circuit Court of Appeals for the Second Circuit upon such questions is liberal, rather than narrow, *Western Assurance Co. v. Mohlman Co.*, *supra*, 820, 821. Wigmore, Secs. 1691-1701, while recognizing that upon authority the matter is doubtful, takes, as he always does, a wise and rational view towards such proof. I can find no controlling authority which requires me to reject the statements as evidence, and I shall accept them as such. 8267

Therefore, the defendants had the qualified right to call their books "Webster's," provided they properly distinguished so as to cut out the secondary meaning, and the only question which can remain is, whether the statement upon the title page of the books is sufficient notice, since the books were properly marked upon the back. The

8269 *Opinion of Judge Hand on Final Hearing.*

form of the notice is that set forth in the final decree of the Circuit Court for the District of Massachusetts, as contained in 190 Fed. R., at page 931. The only criticism which I can make upon the printing at the top of the page is that it is in rather small type. Had the attitude of the complainant been different when the defendants approached it with a view of adopting their make-up to the terms of the Massachusetts decree, I might now be willing to take up the question whether that notice ought not to be more conspicuous upon the page, but I am not disposed to indulge this complaint in such a way in the case at bar. When the defendants each approached its officers in a bona fide effort to accommodate themselves to the utmost rights which the complainant had up to that time enjoyed, they were met with a demand for absolute discontinuance of the name; they are met with it here. This was 8270 illegal and had been so adjudged against this complainant in the very decree which is the basis of any supposed right they may have in the name "Webster." They certainly by such a claim absolved the defendants from any nice adaptation of their typography to the terms of that decree, and I shall not inquire whether it gives the fullest protection to which the complainant is entitled.

I have decided this case upon the assumption that the word, "Webster," had acquired a secondary meaning indicating at once the derivation 8272 of the work and its responsible compiler. That assumption I make in deference to the decision in the First Circuit, though it is in no sense authoritatively binding upon me. There are several reasons why, if it were necessary, I should not hesitate to re-examine that question of fact. In particular the defendant in that case did not contest the question, at least, after the first decision, as his briefs show, nor did he contest it in the

Opinion of Judge Hand on Final Hearing. 8273.

case in the Sixth Circuit. Moreover, the record must have been quite different in that case, for Judge Colt could say that no one but the complainant published any Webster dictionaries between 1847 and 1889, a fact abundantly disproved in the case at bar. I need not here decide the question of secondary meaning, and I accept, since it has not been necessary to question it, the result of the decision in the First Circuit, which is the first success the complainant has ever had in its long and persistent efforts to establish a monopoly over the word "Webster." Nevertheless, this case can never be truthfully cited as in the slightest degree contributing to the establishment of that result, or indicating that I assent in any way to the claim of secondary meaning. That question I leave exactly as I find it, without deciding that the meaning exists, that it does not exist, that it has been proved, or that it has not been proved. 8274

I have looked over all the advertisements of the Syndicate Publishing Company, which make a very shoddy kind of appeal, but after the date when the defendants attempted to come to terms with the complainant they appear usually to bear the addition which the complainant procured as the measure of its relief in the Ogilvie case. As to those which do not and which for the most part are in the form of news articles, I find no evidence to contradict the *bona fides* of the defendant's efforts to conform the advertisement with the decree and I am not disposed to charge them with such as continued to appear. The prominence and form of the suffix must be held satisfactory in view of the complainant's attitude towards the defendant when approached, and its illegal claim of a monopoly in the name. If the defendant was content to yield to the terms of the Ogilvie decree, it might upon the complainant's demand have been subject to some modifi- 8275 8276

8277 *Opinion of Judge Hand on Final Hearing.*

cation of its advertisements as of its title page. That right justified no such proceeding as this, designed to do just what the complainant was forbidden to do in the First Circuit.

8278 As to the Cupples & Leon Company, I am in more doubt, the testimony of Leon is of very unsatisfactory character and his claims to a dictionary upon which the defendant had done any substantial work, are not justified. The advertisements are not warranted by the facts, for it is in no sense the modern book it professes to be. I do not believe that the defendant knew or in the least cared what was its contents, if it would sell as an up-to-date book. However, that gives no rights to the complainant, so long as its own limited use of the name is not infringed. None of the advertisements attempt to pass off the books as the complainant's, and it cannot object that the public is buying as a modern Webster substantially the old Crown Dictionary. The law may some day protect one man who sells a sound quality of goods so described against another who sells an unsound quality, dishonestly described, but it has not done so yet. Now we trust to the public to find out that they have been hoodwinked, and to distinguish. Moreover, it does not certainly appear that the defendant is responsible for its customers' advertisements.

8279 Both bills will be dismissed with costs.

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Final Decree.**8281**

At a stated term of the United States District Court for the Southern District of New York, held in the Court House, Borough of Manhattan, City of New York, on the 31st day of December, 1912.

Present—Hon. LEARNED HAND,

District Judge. **8282**

G. & C. MERRIAM COMPANY,

VS.

CUPPLES & LEON COMPANY.

E 8-161.

This cause came on to be further heard at a **8283** term of this Court, held in the Borough of Manhattan, on the 3rd day of December, 1912, and was argued by counsel, and thereupon, upon consideration thereof, it is

ORDERED, ADJUDGED AND DECREED that the Bill of the Complainant herein be and the same is hereby dismissed upon the merits. And it is

FURTHER ORDERED, ADJUDGED AND DECREED that the complainant, G. & C. Merriam Company, do pay to defendant, Cupples & Leon Company, the **8284** sum of

and
its costs as taxed by the Clerk of this Court, and that the defendant, Cupples & Leon Company, do have execution therefor.

LEARNED HAND,
D. J.

(Filed Jan. 6th, 1913.)

8285

Final Decree.

At a Stated Term of the United States District Court for the Southern District of New York, held in the Court House, Borough of Manhattan, City of New York, on the 31st day of December, 1912.

8286 Present—Hon. LEARNED HAND,
District Judge.

G. & C. MERRIAM COMPANY, VS. SYNDICATE PUBLISHING COMPANY	}	E 8-162.
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This cause came on to be further heard at a term of this Court, held in the Borough of Manhattan, on the 3rd day of December, 1912, and was argued by counsel, and thereupon, upon consideration thereof, it is

ORDERED, ADJUDGED AND DECREED, that the Bill of Complaint of the complainant herein be and the same is hereby dismissed upon the merits. And it is

8288 FURTHER ORDERED, ADJUDGED AND DECREED that the complainant, G. & C. Merriam Company, do pay to defendant, Syndicate Publishing Company, the sum of _____ and its costs as taxed by the Clerk of this Court, and that the defendant Syndicate Publishing Company, do have execution therefor.

LEARNED HAND,

D. J.

(Filed Jan. 6th, 1913.)

Petition for Appeal.

8289

**DISTRICT COURT OF THE UNITED
STATES,****SOUTHERN DISTRICT OF NEW YORK.****G. & C. MERRIAM COMPANY,
Complainant,****VS.****CUPPLES & LEON Co.,
Defendant.**Equity No.
8-161.
Petition
for Appeal.

8290

The G. & C. Merriam Company, complainant above named, feeling itself aggrieved by the decree heretofore made and entered by this Court in this cause on, to wit, the 6th day of January, 1913, dismissing the Bill of Complaint herein upon the merits, with costs, hereby appeals from said decree to the Honorable the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and it prays that its appeal may be allowed, and that a citation issue directed to the above named defendant, Cupples & Leon Co., commanding it to be, and appear before the said United States Circuit Court of Appeals for the Second Circuit, upon the return day thereof, and that a transcript of the record, duly authenticated, may be transmitted to said United States Circuit Court of Appeals for the Second Circuit, and also that an order be made fixing the amount of security which said complainant shall give and furnish upon said appeal, and that upon the giving of such security, all further proceedings in this Court be suspended until the determination of said appeal by said United States Cir-

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Assignment of Errors.

cuit Court of Appeals for the Second Circuit, to the end that said decree of this Court may be reversed and such decree made as to said United States Circuit Court of Appeals for the Second Circuit may seem just.

Dated, January 6th, 1913.

8294

WILLIAM B. HALE,
Solicitor and Counsel for Complainant,
No. 40 Wall Street,
Borough of Manhattan,
New York City.

Assignment of Errors.

DISTRICT COURT OF THE UNITED
STATES,

8295

SOUTHERN DISTRICT OF NEW YORK.

G. & C. MERRIAM COMPANY,
Complainant,

VS.

CUPPLES & LEON Co.,
Defendant.

8296

Equity
No. 8-161.

Assignment
of Errors.

Now comes the above named G. & C. Merriam Company, the complainant and appellant herein, and says, that in the record and proceedings of said Court herein, and in the decree made and entered herein on the 6th day of January, 1913, there is manifest error in this, to wit: -

1. The Court erred in dismissing the bill of complaint herein.

Assignment of Errors.

8297

2. The Court erred in not granting a decree for complainant herein in accordance with the prayer of the bill.

3. The Court erred in holding that defendant might lawfully publish and sell a copy of the English "British Empire Dictionary," under the name and description of "Webster's New Century Dictionary," and in failing and refusing to enjoin defendant's use of the latter title, or any equivalent thereof. 8298

4. The Court erred in failing and refusing to grant an injunction against the use of the name "Webster" in the title of defendant's said dictionary.

5. The Court erred in finding and deciding that defendant's said dictionary was based upon, abridged from, or a revision of, any prior Webster's dictionary. 8299

6. The Court erred in failing and refusing to grant an injunction against defendant's use of the name "Webster" unless accompanied by a plain and unmistakable statement correctly indicating the identity of defendant's said dictionary, and its origin with defendant, or other person, as distinguished from origin with complainant.

7. The Court erred in failing and refusing to find and decree that the titles of defendant's dictionaries are an unlawful infringement and imitation of the prior titles of complainant's dictionaries. 8300

8. The Court erred in failing and refusing to grant an injunction restraining defendant from passing off its said dictionaries as and for dic-

8301

Assignment of Errors.

tionaries of complainant, and from attempting so to do.

9. The Court erred in finding and deciding that defendant's adoption and use of an alleged distinguishing statement shortly prior to the filing of the bill herein, justified the refusal of any injunction.

8302

10. The Court erred in holding that defendant had sufficiently distinguished its books from those of complainant.

11. The Court erred in failing and refusing to find that defendant had infringed all or any of complainant's registered trade-marks, and in failing and refusing to enjoin said infringement.

8303

12. The Court erred in failing and refusing to enjoin defendant's fraudulent and deceptive advertisements.

13. The Court erred in failing and refusing to require defendant to account to complainant for damages and profits by reason of defendant's unlawful acts.

8304

WHEREFORE, complainant and appellant prays that the said decree of said District Court of the United States for the Southern District of New York, for the errors aforesaid, be reversed, and that said Court be instructed to enter a decree in favor of complainant for an injunction and an accounting in accordance with the prayer of the Bill of Complaint, or for such other relief as may be just.

Dated, January 6th, 1913.

WILLIAM B. HALE,

Solicitor and Counsel for Complainant.

Order Allowing Appeal.

8305

At a Stated Term of the District Court of the United States for the Southern District of New York, held at the courtroom of said Court, in the Post Office Building, in the Borough of Manhattan, City of New York, in said Southern District, on the 7th day of January, 1913.

8306

Present—Hon. LEARNED HAND,
District Judge.

G. & C. MERRIAM COMPANY,
Complainant,

VS.

CUPPLES & LEON CO.,
Defendant.

Equity
No. 8-161.
Order
Allowing
Appeal.

8307

On reading and filing the petition for appeal of G. & C. Merriam Company, the complainant herein, and the assignment of errors made and filed herein by said complainant, and upon motion of William B. Hale, solicitor for said complainant, it is

ORDERED that an appeal to the United States Circuit Court of Appeals for the Second Circuit from the final decree heretofore made, entered and filed herein on the 6th day of January, 1913, be, and the same hereby is, allowed, and a citation is directed to issue, and that a transcript of the record be forthwith transmitted to said United States Circuit Court of Appeals for the Second Circuit; and it is further

8308

ORDERED that the amount of the security on ap-

8309

Petition for Appeal.

8310 peal to be furnished by said G. & C. Merriam Company, complainant, be, and the same hereby is, fixed at the sum of One thousand dollars (\$1,000.00), and that upon the making and filing with the clerk of this court of a good and sufficient bond in the said sum by the said G. & C. Merriam Company, with good and sufficient surety, all further proceedings in this court be suspended and stayed until the final determination of said appeal by the said United States Circuit Court of Appeals for the Second Circuit.

LEARNED HAND,
United States District Judge.

Petition for Appeal.

DISTRICT COURT OF THE UNITED
STATES,

8311

SOUTHERN DISTRICT OF NEW YORK.

G. & C. MERRIAM COMPANY,
Complainant-Appellant,

VS.

8312 THE SYNDICATE PUBLISHING COM-
PANY,
Defendant-Respondent.

Equity
No. 8-162.
Petition
for Appeal.

The G. & C. Merriam Company, complainant above named, feeling itself aggrieved by the decree heretofore made and entered by this Court in this cause on, to wit, the 6th day of January, 1913, dismissing the Bill of Complaint herein upon

Petition for Appeal.

8313

the merits, with costs, hereby appeals from said decree to the Honorable the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the Assignment of Errors which is filed herewith, and it prays that its appeal may be allowed, and that a citation issue directed to the above-named defendant, The Syndicate Publishing Company, commanding it to be and appear before the United States Circuit Court of Appeals for the Second Circuit, upon the return day thereof, and that a transcript of the record, duly authenticated, may be transmitted to said United States Circuit Court of Appeals for the Second Circuit, and also that an order be made fixing the amount of security which said complainant shall give and furnish upon said appeal, and that upon the giving of such security, all further proceedings in this court be suspended until the determination of said appeal by said United States Circuit Court of Appeals for the Second Circuit, to the end that said decree of this Court may be reversed and such decree made as to said United States Circuit Court of Appeals for the Second Circuit may seem just.

8314

8315

Dated, January 6th, 1913.

WILLIAM B. HALE,

Solicitor and Counsel for Complainant,

No. 40 Wall Street,

Borough of Manhattan,

New York City.

8316

8317

Assignments of Error.**DISTRICT COURT OF THE UNITED
STATES,****SOUTHERN DISTRICT OF NEW YORK.**

8318

**G. & C. MERRIAM COMPANY,
Complainant-Appellant,****vs.****THE SYNDICATE PUBLISHING COM-
PANY,
Defendant-Respondent.****Equity
No. 8-162.
Assignments
of Error.**

8319

Now COMES the above named G. & C. Merriam Company, the complainant and appellant herein, and says, that in the record and proceedings of said Court herein, and in the decree made and entered herein on the 6th day of January, 1913, there is manifest error in this, to wit:

1. The Court erred in dismissing the bill of complaint herein.

2. The Court erred in not granting a decree for complainant herein in accordance with the prayer of the bill.

8320

3. The Court erred in holding that defendant might lawfully publish and sell a copy of the English "British Empire Dictionary" under the name and description of "Webster's New Standard Dictionary," and in failing and refusing to enjoin the defendant's use of the latter title, or any equivalent thereof.

4. The Court erred in failing and refusing to grant an injunction against the use of the name

Assignments of Error.

8321

"Webster" in the title of defendant's said dictionary.

5. The Court erred in finding and deciding that defendant's said dictionary was based upon, abridged from, or a revision of, any prior Webster's Dictionary.

6. The Court erred in failing and refusing to grant an injunction against defendant's use of the name "Webster" unless accompanied by a plain and unmistakable statement correctly indicating the identity of defendant's said dictionary, and its origin with defendant, or other person, as distinguished from origin with complainant. 8322

7. The Court erred in failing and refusing to find and decree that the titles of defendant's dictionaries are an unlawful infringement and imitation of the prior titles of complainant's dictionaries. 8323

8. The Court erred in failing and refusing to grant an injunction restraining defendant from passing off its said dictionaries as and for the dictionaries of complainant, and from attempting so to do.

9. The Court erred in finding and deciding that defendant's adoption and use of an alleged distinguishing statement shortly prior to the filing of the bill herein, justified the refusal of any injunction. 8324

10. The Court erred in holding that defendant had sufficiently distinguished its books from those of complainant.

8325

Assignments of Error.

11. The Court erred in failing and refusing to find that defendant had infringed all or any of complainant's registered trade-marks, and in failing and refusing to enjoin said infringement.

12. The Court erred in failing and refusing to enjoin defendant's fraudulent and deceptive advertisements.

8326

13. The Court erred in failing and refusing to require defendant to account to complainant for damages and profits by reason of defendant's unlawful acts.

8327

WHEREFORE, complainant and appellant prays that the said decree of said District Court of the United States, for the Southern District of New York, for the errors aforesaid, be reversed, and that said Court be instructed to enter a decree in favor of complainant for an injunction and an accounting in accordance with the prayer of the Bill of Complaint, or for such other relief as may be just.

Dated, January 6th, 1913.

WILLIAM B. HALE,
Solicitor and Counsel for Complainant.

8328

Order Allowing Appeal.

8329

At a stated term of the District Court of the United States for the Southern District of New York, held at the courtroom of said court, in the Post Office Building, in the Borough of Manhattan, City of New York, in said Southern District, on the 7th day of January, 1913.

8330

Present—Hon. LEARNED HAND, District Judge.

<p>G. & C. MERRIAM COMPANY, Complainant,</p> <p style="text-align: center;">VS.</p> <p>THE SYNDICATE PUBLISHING COMPANY, Defendant.</p>	}	<p>Equity No. 8-162. Order Allowing Appeal.</p>
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8331

On reading and filing the petition for appeal of G. & C. Merriam Company, the complainant herein, and the assignment of errors made and filed by said complainant, and upon motion of William B. Hale, solicitor for said complainant, it is

ORDERED that an appeal to the United States Circuit Court of Appeals for the Second Circuit from the final decree heretofore made, entered and filed herein on the 6th day of January, 1913, be, and the same hereby is, allowed, and a citation is directed to issue, and that a transcript of the record be forthwith transmitted to said United States Circuit Court of Appeals for the Second Circuit; and it is further

8332

ORDERED that the amount of the security on ap-

8333

Appeal Bonds.

peal to be furnished by said G. & C. Merriam Company, complainant, be, and the same hereby is, fixed at the sum of One thousand dollars (\$1,000.00), and that upon the making and filing with the Clerk of this court of a good and sufficient bond in the said sum by the said G. & C. Merriam Company, with good and sufficient surety, all further proceedings in this court be suspended and stayed until the final determination of said appeal by the said United States Circuit Court of Appeals for the Second Circuit.

LEARNED HAND,
United States District Judge.

Appeal Bonds.

[Appeal bonds in each case were approved and
8335 filed on Jan. 7, 1913. Printing of bonds is omitted
by consent.]

8336

Citation on Appeal.

8337

BY THE HONORABLE Judges of the DISTRICT COURT
OF THE UNITED STATES, for the SOUTHERN
DISTRICT OF NEW YORK, in the SECOND CIR-
CUIT.

To Cupples & Leon Co., a corporation, GREETING :

YOU ARE HEREBY CITED and admonished to be
and appear before a UNITED STATES CIRCUIT
COURT OF APPEALS for the Second Circuit, to be
holden at the Borough of Manhattan, in the City 8338
of New York, in the District and Circuit above
named, on the 5th day of February, 1913, pur-
suant to an appeal filed in the Clerk's office of
the District Court of the United States for the
Southern District of New York, wherein G. & C.
Merriam Company, a corporation, is complainant
and appellant, and you are defendant and appel-
lee, to show cause, if any there be, why the final
decree in said cause mentioned should not be
corrected and speedy justice should not be done 8339
in that behalf.

GIVEN UNDER MY HAND at the Borough of
Manhattan, in the City of New York,
in the District and Circuit above
named, this 7th day of January, in the
year of our Lord One Thousand Nine
Hundred and Thirteen, and of the In-
dependence of the United States the
One Hundred and Thirty-seventh.

LEARNED HAND, 8340

Judge of the District Court of
the United States, for the South-
ern District of New York, in the
Second Circuit.

Service of the within citation is hereby admit-
ted this 7th day of January, 1913.

GOULD & WILKIE,
Solicitors for Defendant-Appellee.

8341

Citation on Appeal.

BY THE HONORABLE Judges of the DISTRICT COURT
OF THE UNITED STATES, for the SOUTHERN
DISTRICT OF NEW YORK, in the SECOND CIR-
CUIT.

To The Syndicate Publishing Company, a cor-
poration, GREETING:

8342

YOU ARE HEREBY CITED and admonished to be
and appear before a UNITED STATES CIRCUIT
COURT OF APPEALS for the Second Circuit, to be
holden at the Borough of Manhattan, in the City
of New York, in the District and Circuit above
named, on the 5th day of February, 1913, pursu-
ant to an appeal filed in the Clerk's office of the
District Court of the United States for the South-
ern District of New York, wherein G. & C. Mer-
riam Company, a corporation, is complainant and
appellant, and you are defendant and appellee,
to show cause, if any there be, why the final de-
cree in said cause mentioned should not be cor-
rected and speedy justice should not be done in
that behalf.

8343

GIVEN UNDER MY HAND at the Borough of
Manhattan, in the City of New York,
in the District and Circuit above
named, this 7th day of January, in the
year of our Lord One Thousand Nine
Hundred and Thirteen, and of the In-
dependence of the United States the
One Hundred and Thirty-seventh.

8344

LEARNED HAND,

Judge of the District Court of
the United States, for the South-
ern District of New York, in the
Second Circuit.

Service of the within citation is hereby admit-
ted this 7th day of January, 1913.

STRONG & CADWALADER,
Solicitors for Defendant-Appellee.

Order as to Exhibits.

8345

**DISTRICT COURT OF THE UNITED
STATES,****SOUTHERN DISTRICT OF NEW YORK.****G. & C. MERRIAM COMPANY,
Complainant-Appellant,****VS.****CUPPLES & LEON Co.,
Defendant-Appellee.**Equity
No. 8-161.
Order.

8346

Upon all the proceedings herein, and on motion of counsel for complainant-appellant, it is

ORDERED that all original exhibits offered in evidence herein by either party be sent up to the United States Circuit Court of Appeals, for the Second Circuit, for use on the appeal herein in lieu of printed copies thereof except only the following named exhibits which have been already printed and used at the final hearing, viz: "Complainant's Exhibit, Title Pages, Cover Inscriptions, and Copyright Notices of Webster Series;" "Complainant's Exhibit, Copyright Certificates of Webster Series;" "Complainant's Exhibit, Early Contracts and Assignments;" "Complainant's Exhibit, Certified Copies of Trade-Mark Registrations;" "Complainant's Exhibit, Webster in the Courts;" "Complainant's Red Letter Exhibit, Showing Identity of Defendant's Dictionary with British Empire Dictionary."

8347

8348

Dated, January 7th, 1913.

LEARNED HAND,
U. S. District Judge.

8349

Order as to Exhibits.**DISTRICT COURT OF THE UNITED
STATES,****SOUTHERN DISTRICT OF NEW YORK.**

G. & C. MERRIAM COMPANY,
Complainant-Appellant,

8350

vs.

THE SYNDICATE PUBLISHING COM-
PANY,
Defendant-Appellee.

Equity
No. 8-162.
Order.

Upon all the proceedings herein, and on motion of counsel for complainant-appellant, it is

8351 ORDERED that all original exhibits offered in evidence herein by either party be sent up to the United States Circuit Court of Appeals, for the Second Circuit, for use on the appeal herein in lieu of printed copies thereof except only the following named exhibits which have been already printed and used at the final hearing, viz: "Complainant's Exhibit, Title Pages, Cover Inscriptions, and Copyright Notices of Webster Series;" "Complainant's Exhibit, Copyright Certificates of Webster Series;" "Complainant's Exhibit, Early Contracts and Assignments;" 8352 "Complainant's Exhibit, Certified Copies of Trade-Mark Registrations;" "Complainant's Exhibit, Webster in the Courts;" "Complainant's Red Letter Exhibit, Showing Identity of Defendant's Dictionary with British Empire Dictionary."

Dated, January 7th, 1913.

LEARNED HAND,
U. S. District Judge.

Stipulation as to Record on Appeal.

8353

**DISTRICT COURT OF THE UNITED
STATES,****SOUTHERN DISTRICT OF NEW YORK.****G. & C. MERRIAM COMPANY,
Complainant-Appellant,****vs.****CUPPLES & LEON Co.,
Defendant-Appellee.****Equity
No. 8-161.**

8354

**G. & C. MERRIAM COMPANY,
Complainant-Appellant,****vs.****THE SYNDICATE PUBLISHING COM-
PANY,
Defendant-Appellee.****Equity
No. 8-162.**

8355

IT IS HEREBY STIPULATED that the record on appeal in the above-entitled causes shall consist of all pleadings, stipulations, depositions, exhibits, opinion of the Court at final hearing, the final decree filed in the clerk's office on January 6th, 1913, 8356 the petition for appeal, the assignment of errors, the order allowing the appeal and citation on appeal.

IT IS FURTHER STIPULATED that all the original exhibits offered in evidence by either party shall be sent up to the United States Circuit Court of Appeals for the Second Circuit, for use on the appeal herein, in lieu of printed copies thereof, except only such exhibits as have been already

8357

Stipulation to Abide Event.

printed for use at the final hearing and which appear in the printed record used upon said final hearing.

Dated, January 7th, 1913.

WILLIAM B. HALE,
Solicitor for Complainant-Appellant.

8358

GOULD & WILKIE,
Solicitors for Defendant-Appellee,
Cupples & Leon Co.

STRONG & CADWALADER,
Solicitors for Defendant-Appellee,
Syndicate Publishing Co.

Stipulation to Abide Event.

8359

DISTRICT COURT OF THE UNITED STATES.

SOUTHERN DISTRICT OF NEW YORK.

C. & C. MERRIAM COMPANY,
Complainant,

vs.

CUPPLES & LEON CO.,
Defendant.

Equity No.
8-161.

8360

IT IS HEREBY STIPULATED that the pleadings in the above entitled cause be not printed in the record on appeal herein; that upon the filing of the record on appeal in the Circuit Court of Appeals for the Second Circuit, this cause shall be reserved generally, and all further proceedings

Stipulation to Abide Event.

8361

therein shall be, and hereby are, stayed, until the final determination of the suit of G. & C. Merriam Company *vs.* The Syndicate Publishing Company, begun in the District Court of the United States for the Southern District of New York (Eq. No. 8-162), now pending on appeal to said Circuit Court of Appeals for the Second Circuit; that this cause shall abide the final result of said suit against The Syndicate Publishing Company, after any and all appeals to the Circuit Court of Appeals or the Supreme Court, or other proceedings in review, which have been or may hereafter be taken by either party to said suit; that upon the entry of such final decree in said suit against the Syndicate Publishing Company, a similar decree to the same effect shall be entered in this suit, upon motion of either party, made upon three days' notice, and upon this stipulation and a certified copy of said final decree in said suit. 8362

8363

Dated, New York, January 13, 1913.

WILLIAM B. HALE,
Solicitor for G. & C. Merriam Co.,
Complainant-Appellant.

GOULD & WILKIE,
Solicitors for Cupples & Leon Co.,
Defendant-Appellee.

8364

8365

Stipulation for Certification of Record.
DISTRICT COURT OF THE UNITED
STATES,

SOUTHERN DISTRICT OF NEW YORK.

8366

G. & C. MERRIAM COMPANY,
Complainant-Appellant,

vs.

CUPPLES & LEON CO.,
Defendant-Appellee.

Equity
No. 8-161.

8367

G. & C. MERRIAM COMPANY,
Complainant-Appellant,

vs.

THE SYNDICATE PUBLISHING COM-
PANY,
Defendant-Appellee.

Equity
No. 8-162.

IT IS HEREBY STIPULATED that the foregoing printed transcript consisting of three volumes, paged consecutively from (1) to (2091), both inclusive, is a correct transcript of the record of the District Court in the above-entitled matters, as agreed upon, and that the same may be certified by the Clerk accordingly.

8368

Dated, New York, January , 1913.

WILLIAM B. HALE,
Solicitor for Appellant.

GOULD & WILKIE,
Solicitors for Cupples & Leon Co.,
Appellee.

STRONG & CADWALADER,
Solicitors for Syndicate Publish-
ing Company, Appellee.

Certification of Record.

8369

UNITED STATES OF AMERICA, }
 SOUTHERN DISTRICT OF NEW YORK, } ss.:

G. & C. MERRIAM COMPANY,
 Complainant,

vs.

Eq. 8-161.

CUPPLES & LEON COMPANY,
 Defendant.

8370

G. & C. MERRIAM COMPANY,
 Complainant,

vs.

Eq. 8-162.

SYNDICATE PUBLISHING COMPANY,
 Defendant.

8371

I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript in three (3) volumes, comprising pages 1 to 2093 both inclusive, of the record of the District Court in the above-entitled matters, as agreed upon.

IN TESTIMONY WHEREOF, I have caused the 8372

seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this

[SEAL]

day of January, in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the said United States the one hundred and thirty-seventh.

ALEXANDER GILCHRIST, JR.,
 Clerk.

United States Circuit Court of Appeals for the Second Circuit,
October Term, 1912.

No. 210.

Argued May 19, 1913; Decided June 18, 1913.

G. & C. MERRIAM COMPANY, Complainant-Appellant,
vs.

THE SYNDICATE PUBLISHING COMPANY, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern
District of New York.

Before Lacombe, Ward, and Noyes, Circuit Judges.

Appeal from a final decree of the District Court, Southern District
of New York, dismissing the bill of complaint upon the merits in
a suit charging unfair competition and the infringement of trade
marks.

PER CURIAM:

Taken as a whole, we fully approve Judge Hand's opinion and
upon it affirm the decree appealed from. In so doing, however, we
must not be regarded as assenting to the proposition that the name
"Webster's Dictionary" has a technical or secondary meaning as in-
dicating a publication of the complainant. And, on the other hand,
we must not be considered as indicating an opinion that cases cannot
be presented showing unfair competition in the sale of books or as
passing upon the relief which may be granted in cases of fraud.

The decree of the District Court is affirmed with costs.

W. D. Guthrie and W. B. Hale, for the Appellant.

H. A. Bayne, for the Appellee.

At a stated term of the United States Circuit Court of Appeals in
and for the Second Circuit, held at the court rooms, in the post
office building, in the city of New York, on the 28th day of June,
one thousand nine hundred and thirteen.

Present: Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon.
Walter C. Noyes, Circuit Judges.

G. & C. MERRIAM COMPANY, Complainant-Appellant,
vs.

SYNDICATE PUBLISHING COMPANY, Defendant-Appellee.

Appeal from the District Court of the United States for the Southern
District of New York.

This cause came on to be heard on the transcript of record from
the District Court of the United States, for the Southern District of
New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. G. W.

Endorsed: United States Circuit Court of Appeals, Second Circuit. Merriam Co. vs. Syndicate Pub. Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul- 2, 1913. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

G. & C. MERRIAM COMPANY, Complainant-Appellant,

vs.

THE SYNDICATE PUBLISHING COMPANY, Defendant-Respondent.

Petition for Appeal.

The G. & C. Merriam Company, the complainant and appellant above named, feeling itself aggrieved by the order and decree heretofore made and entered by this Court in this cause on to wit the 2nd day of July, 1913, which said order and decree affirmed the decree of the District Court of the United States, for the Southern District of New York, dismissing the bill of complaint herein upon the merits with costs, hereby appeals from said order and decree of this Court to the Supreme Court of the United States, for the reasons specified in the Assignment of Errors which is filed herewith, and it prays that its appeal may be allowed, and that a citation issue directed to the above named defendant-respondent, The Syndicate Publishing Company, commanding it to be and appear before the said Supreme Court of the United States upon the return day thereof, and that a transcript of the record, duly authenticated, may be transmitted to said Supreme Court of the United States, and also that an order be made fixing the amount of security which said complainant-appellant shall give and furnish upon said appeal, and that upon the giving of such security, all further proceedings in this Court be suspended until the determination of said appeal by said Supreme Court of the United States, to the end that said order and decree of this Court hereby appealed from may be reversed and such decree made as to said Supreme Court of the United States may seem just.

Dated, July 3rd, 1913.

WILLIAM B. HALE,
Solicitor and Counsel for Complainant-Appellant,
No. 40 Wall Street, Borough of Manhattan,
New York City.

(Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. G. & C. Merriam Co., Complainant-App'l't, vs. The Syndicate

Publishing Co., Defendant-Resp'd't. Petition for Appeal, William B. Hale, Solicitor & Counsel for Complainant-App'l't, 40 Wall Street, New York City, Manhattan Boro. United States Circuit Court of Appeals, Second Circuit. Filed Jul- 3, 1913. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

G. & C. MERRIAM COMPANY, Complainant-Appellant,
vs.

THE SYNDICATE PUBLISHING COMPANY, Defendant-Respondent.

Order Allowing Appeal.

On reading and filing the petition for appeal of G. & C. Merriam Company, the complainant and appellant herein, and the assignment of errors made and filed by said complainant, and upon motion of William B. Hale, solicitor and counsel for said complainant-appellant, it is

Ordered that an appeal to the Supreme Court of the United States from the order and decree heretofore made and entered herein on the 2nd day of July, 1913, be, and the same hereby is allowed, and a citation is directed to issue, and that a duly authenticated transcript of the record be forthwith transmitted to said Supreme Court of the United States; and it is further

Ordered that the amount of the security on appeal to be furnished by said G. & C. Merriam Company, complainant and appellant herein, be, and the same hereby is fixed at the sum of Five hundred dollars (\$500), and that upon the making and filing with the Clerk of this Court of a good and sufficient bond in the said sum by said G. & C. Merriam Company, with good and sufficient sureties, all further proceedings in this Court be suspended and stayed until the final determination of said appeal by said Supreme Court of the United States.

Dated, July 3rd, 1913.

H. G. WARD,

U. S. Circuit Judge.

(Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. G. & C. Merriam Co., Complainant-App'l't, vs. The Syndicate Publishing Co., Defendant-Resp'd't. Order Allowing Appeal. William B. Hale, Solicitor & Counsel for Complainant-App'l't, 40 Wall Street, New York City, Manhattan Boro. United States Circuit Court of Appeals, Second Circuit. Filed Jul- 3, 1913. William Parkin, Clerk.

United States Circuit Court of Appeals for the Second Circuit.

G. & C. MERRIAM COMPANY, Complainant-Appellant,
vs.

THE SYNDICATE PUBLISHING COMPANY, Defendant-Respondent.

Assignment of Errors.

Now comes the above named G. & C. Merriam Company, the complainant and appellant herein, and says, that in the record and proceedings of said Court herein, and in the order and decree made and entered herein by said Court on the 2nd day of July, 1913, there is manifest error in this, to wit:

1. The Court erred in affirming the decree of the District Court of the United States for the Southern District of New York dismissing the bill of complaint herein.

2. The Court erred in not reversing the decree of the District Court of the United States for the Southern District of New York herein, and in not granting any relief whatever to complainant in accordance with the prayer of the bill.

3. The Court erred in failing and refusing to find that defendant had infringed all or any of complainant's registered trade-marks, and in failing and refusing to enjoin said infringement.

4. The Court erred in holding that defendant might lawfully publish and sell a copy of the English book entitled, "British Empire Dictionary" with name changed to "Webster's New Standard Dictionary" and "Webster's New Illustrated Dictionary," and in failing and refusing to enjoin defendant's use of the latter titles or any equivalent thereof.

5. The Court erred in failing and refusing to grant an injunction against defendant's use of the name "Webster" unless accompanied by a plain and unmistakable statement correctly indicating the identity of defendant's said dictionary and its origin with defendant or other person as distinguished from origin with complainant.

7. The Court erred in finding and deciding that defendant's said dictionary was based upon, abridged from, or a revision of any prior Webster's Dictionary.

8. The Court erred in failing and refusing to find and decide that the titles of defendant's dictionaries are an unlawful infringement and imitation of the prior titles of complainant's dictionaries.

9. The Court erred in failing and refusing to grant an injunction restraining defendant from passing off its said dictionaries as and for the dictionaries of complainant, and from attempting so to do.

10. The Court erred in finding and deciding that defendant's adoption and use of an alleged distinguishing statement shortly prior to the filing of the bill herein justified the denial of any injunction, defendant having denied and contested any obligation to continue using such alleged distinguishing statement, and said statement being inadequate to prevent deception of purchasers.

11. The Court erred in holding that defendant had sufficiently distinguished its books from those of complainant.

12. The Court erred in failing and refusing to enjoin defendant's fraudulent and deceptive advertisements of its said dictionaries.

13. The Court erred in failing and refusing to require defendant to account to complainant for damages and profits by reason of defendant's unlawful acts.

Wherefore complainant and appellant prays that said order and decree of said United States Circuit Court of Appeals for the Second Circuit, for the errors aforesaid, be reversed, and that a decree may be directed in favor of complainant-appellant for an injunction and an accounting in accordance with the prayer of the bill of complaint, or for such other relief as may be just.

Dated, July 3rd, 1913.

WILLIAM B. HALE,

Solicitor and Counsel for Complainant-Appellant.

(Endorsed:) U. S. Circuit Court of Appeals for the Second Circuit. G. & C. Merriam Company, Complainant-App't, vs. The Syndicate Publishing Co., Defendant-Resp'd't. Assignment of Errors. William B. Hale, Solicitor & Counsel for Complainant-App't, 40 Wall Street, New York City, Manhattan Boro. United States Circuit Court of Appeals, Second Circuit. Filed Jul- 3, 1913. William Parkin, Clerk.

American Surety Company of New York.

Capital and Surplus over \$6,000,000.

Company's Office Building, 100 Broadway, New York.

United States Circuit Court of Appeals for the Second Judicial Circuit.

G. & C. MERRIAM COMPANY, Complainant and Appellant,
against

SYNDICATE PUBLISHING COMPANY, Defendant and Appellee.

Know all men by these presents, That we, G. & C. Merriam Company, as Principal, and American Surety Company of New York, as Surety, are held and firmly bound unto the above-named defendant, Syndicate Publishing Company, in the sum of Five Hundred Dollars (\$500.00), to be paid to the said defendant Syndicate Publishing Company, its successors or assigns; for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the Second day of July, 1913.

Whereas, the appellant in the above-entitled suit has prosecuted an appeal to the Supreme Court of the United States, to reverse the order of the Circuit Court of Appeals for the Second Judicial Dis-

trict, entered on the 2nd day of July, 1913, affirming the judgment rendered herein on the 6th day of January, 1913, by the Judge of the District Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, That if the said appellant shall prosecute said appeal to effect and answer all damages and costs if it shall fail to make its plea good, then this Obligation shall be void; otherwise to remain in full force and virtue.

G. & C. MERRIAM COMPANY,
By WILLIAM B. HALE,

Its Solicitor. [SEAL.]

AMERICAN SURETY COMPANY OF
NEW YORK,

By MARSHALL S. BROWER,

Resident Vice-President.

Attest:

GEO. R. CROSBY,

Resident Assistant Secretary.

G. & C. MERRIAM COMPANY,

By WILLIAM B. HALE,

Its Solicitor.

STATE OF NEW YORK,

County of New York, ss:

On this 28th day of June, 1913, before me personally appeared Marshall L. Brower, Resident Vice President of the American Surety Company of New York, to me known, who, being by me duly sworn, did depose and say: that he resides in The City of New York, N. Y.; that he is the Resident Vice President of the American Surety Company of New York, the Corporation described in and which executed the above instrument; that he knows the corporate seal of said Corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said Corporation; and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets as ascertained in the manner provided by law. And the said Marshall L. Brower further said that he is acquainted with George R. Crosby and knows him to be one of the Resident Assistant Secretaries of said Corporation; that the signature of said George R. Crosby subscribed to the said instrument is in the genuine handwriting of the said George R. Crosby and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Marshall L. Brower, Resident Vice President.

[SEAL.]

L. A. FARRS,

Notary Public, New York County, No. 1058;

Register's Office, New York County, No. 5015.

Certificate filed in all counties.

Extract from the Record Book of the Executive Committee of the American Surety Company of New York.

"A meeting of the Executive Committee of the American Surety Company of New York was held on the 6th day of May, 1913.

* * * * *

"The following resolutions were adopted:

"Resolved, That Lester S. Moore, of New York City, N. Y., be and he is hereby constituted and appointed a Resident Vice President of this Company at the town or city aforesaid, with full power and authority to execute and deliver any and all surety bonds and undertakings, for or on behalf of this Company, in its business and in accordance with its charter; such bonds and undertakings to have in every instance, however, the seal of this Company affixed thereto, and to be attested by the signature of a Resident Assistant Secretary of this Company.

"Resolved, That E. D. Sadler and George R. Crosby, of New York City, N. Y., be and they hereby are and each of them is hereby constituted and appointed a Resident Assistant Secretary of this Company at the town or city aforesaid, with full power and authority to attest any and all surety bonds and undertakings, for or on behalf of this Company, in its business and in accordance with its charter; such bonds and undertakings to have in every instance, however, the seal of this Company affixed thereto, and to be executed on behalf of this Company by one of its Resident Vice Presidents."

STATE OF NEW YORK,

County of New York, ss:

I, W. H. Riley, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Executive Committee of the American Surety Company of New York, with the original record of said Executive Committee, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same are correct and true transcripts therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 5th day of June, 1913.

(Signed)

[L. s.]

W. H. RILEY,
Assistant Secretary.

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was

held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 21, 1913, at eleven o'clock a. m.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 10, 1912, for the purpose of nominating * * * officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for * * *

Place.	Resident Vice Presidents.	Resident Assistant Secretaries.
New York, N. Y.	Horace P. Hollister. Marshall L. Brower. A. E. Cotterell. Wm. M. Tomlins, Jr.	A. L. Adams. Marshall L. Brower. William H. Bishop. A. E. Cotterell. Charles S. Waterbury. Daniel Stewart.

* * * * *

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the Members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

* * * * *

"The following resolution was adopted:

"Resolved, that the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

* * * * *

STATE OF NEW YORK,

County of New York, ss:

I, W. H. Riley, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth

and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 22nd day of May, 1913.

(Signed)

W. H. RILEY,

Assistant Secretary.

[L. s.]

(Endorsed:) United States Circuit Court of Appeals, Second Circuit. G. & C. Merriam Company, Complainant and Appellant, against Syndicate Publishing Company, Defendant and Appellee. Supersedeas Bond. Amount and form approved. Strong & Cadwalader, Counsel for Def't-Appellee. Approved, H. G. Ward, U. S. C. J. United States Circuit Court of Appeals, Second Circuit. Filed Jul-3, 1913. William Parkin, Clerk.

UNITED STATES OF AMERICA,

Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 2110 (3 vols.) inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of G. & C. Merriam Company, Complainant-Appellant, against Syndicate Publishing Company, Defendant-Appellee, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 10th day of July, in the year of our Lord One Thousand Nine Hundred and thirteen and of the Independence of the said United States the One Hundred and thirty-eighth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Syndicate Publishing Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, to be held in the City of Washington, District of Columbia, on the 1st day of August, 1913, next, pursuant to an appeal duly allowed by the United States Circuit Court of Appeals for the Second Circuit, and filed in the Clerk's office of said Court on the 3rd day of July, 1913, in a cause wherein G. & C. Merriam Company, a corporation, is the appellant, and you, The Syndicate Publishing Company, are the appellee, to show cause, if any there be, why the decree heretofore rendered against the said

appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States, this 3rd day of July, Nineteen hundred and thirteen, and of the Independence of the United States the One hundred and thirty-seventh.

[Seal United States Circuit Court of Appeals, Second Circuit.]

H. G. WARD,

United States Circuit Judge in and for the Second Circuit.

Service of the above citation is hereby accepted on behalf of the said The Syndicate Publishing Company, appellee, this 3rd day of July, 1913.

STRONG & CADWALADER,

Solicitors and Counsel for Appellee.

[Endorsed:] U. S. Circuit Court of Appeals for the Second Circuit. G. & C. Merriam Company, Complainant-App'l't, vs. The Syndicate Publishing Co., Defendant-Resp'd't. Original. Citation on Appeal. William B. Hale, Solicitor & Counsel for Complainant-Appellant, 40 Wall Street, New York City, Manhattan Boro. United States Circuit Court of Appeals, Second Circuit. Filed Jul-3, 1913. William Parkin, Clerk.

Endorsed on cover: File No. 23,795. U. S. Circuit Court of Appeals, 2d Circuit. Term No. 644. G. & C. Merriam Company, appellant, vs. The Syndicate Publishing Company. Filed July 16th, 1913. File No. 23,795.

2

Office Supreme Court, U. S.

FILED

FEB 1 1915

JAMES D. MAHER

CLERK

Supreme Court of the United States.

OCTOBER TERM, 1914. No. 217.

G. & C. MERRIAM COMPANY,

Complainant-Appellant.

v.

SYNDICATE PUBLISHING COMPANY,

Defendant-Appellee.

BRIEF ON BEHALF OF COMPLAINANT-APPELLANT WITH
APPENDIX CONTAINING ABSTRACT OF TESTIMONY.

WILLIAM B. HALE,

Counsel for Complainant-Appellant.

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Supreme Court of the United States.

G. & C. MERRIAM COMPANY,
Complainant-Appellant,

vs.

SYNDICATE PUBLISHING COMPANY,
Defendant-Appellee.

OCTOBER TERM,
1914.
No. .

BRIEF AND ARGUMENT FOR APPELLANT.

I.

STATEMENT:

This is an appeal from the affirmance, by the Circuit Court of Appeals for the Second Circuit, of a final decree of the District Court for the Southern District of New York dismissing the bill of complaint upon the merits with costs.

The bill charges unfair competition and infringement of registered trade-marks, by means of which defendant is passing off a British dictionary as and for the well-known "Webster" dictionaries of the complainant. In sustaining exceptions to the answer, Judge Hough concisely stated the object of the suit as follows:—"In my opinion the bill alleges that by reason of a long continued and lawful course of business and by the registration of certain trade-marks, it [complainant] has acquired such rights in the word 'Webster' as applied to dictionaries that it is entitled to complain of certain specific acts of defendant, viz.: Obtaining the plates of a book called the 'Crown Dictionary' and printing therefrom a book re-entitled

'Webster's New Standard Dictionary,' the only new thing about it being the title." (Opinion filed January 23rd, 1912.)

Jurisdiction is rested not alone upon diverse citizenship (though the necessary diversity exists, and is alleged), but also upon federal questions as to the validity and infringement of trade-marks registered respectively under the Trade-mark acts of 1881 and 1905.

The name "Webster" in the title of dictionaries has for many years been identified with complainant's publications, and as such has acquired a secondary meaning indicating the dictionaries compiled and published by complainant, the Merriam Company. The wrong alleged is (1) the use by defendant of that name in the title of its dictionary and (2) the publication of misleading and deceptive advertisements. The bill prays an injunction against these acts and an accounting. Judge Coxe, in granting a preliminary injunction, at which time it was not known that defendant's book was substantially a mere reprint of a British dictionary, and defendant's affidavits that it was revised from Webster were uncontradicted, required the defendant to accompany its use of the name Webster with a warning statement intended to distinguish its books from the books of complainant, and enjoined any form of deceptive advertising. The dismissal of the bill upon the merits, however, has terminated even this limited protection, although the proofs at final hearing entitled complainant to a much broader injunction.

The basis for the relief sought.

The bill alleges in substance and the evidence establishes that complainant's predecessors, Messrs G. & C.

Merriam, acquired in or about the year 1847 the then existing series of "Webster" dictionaries from the estate of Noah Webster; that this series has been continued to the present time by complainant and its predecessors, who have compiled, published and sold numerous revised dictionaries, each of which has been designated and known by the name of "Webster's Dictionary"; that by reason of this long, lawful and exclusive use, the name "Webster" or Webster's", as applied to dictionaries, has acquired a trade significance and a secondary meaning, and indicates to the public that all dictionaries bearing that name are the dictionaries of the complainant; that in 1908, the defendant purchased the plates of an older dictionary then entitled and known as the "Crown Dictionary" and changed its name to that of "Webster's New Standard Dictionary", and, after eliminating all distinguishing marks, largely sold it under the latter name (also as "Webster's New Illustrated Dictionary"), and that such use of the name "Webster's Dictionary" as the substituted title of defendant's "Crown Dictionary" is fraudulent and deceptive and has deceived many persons into buying defendant's dictionary as and for a dictionary of complainant. It is further alleged and the evidence establishes that the complainant is the proprietor of ten registered trade-marks consisting of the word "Webster" in combination with other words or features, and that defendant's use of that name upon its dictionaries is an infringement of these registered trade-marks. Two of these trade-marks were registered in 1890, one consisting of a monogram "N W" together with the word "Webster's"; the other consisting of the same monogram together with the words "Webster's Inter-

national." The remaining eight trade-marks were registered in 1907 under the "ten year clause" of the Act of 1905, and consist respectively of the words, "Webster's Academic", "Webster's Common School", "Webster's Primary", "Webster's High School", "Webster's Condensed", "Webster's Practical", "Webster's National Pictorial", and "Webster's Counting-house and Family." It is also alleged and was proved that defendant had issued fraudulent and deceptive advertisements of its dictionary.¹

No infringement of complainant's copyrights is charged in this suit, and no protection to literary property as such is sought. The text of defendant's book does not infringe the text of complainant's books. It is wholly different. *It is the fraudulent title only of which complaint is made.* The case is solely and simply one for an injunction against unfair competition and infringement of trade-marks whereby defendant is trespassing upon the good will and reputation of complainant's dictionaries, and is deceiving the public into purchasing defendant's copy of a British dictionary under belief that it is one of the well-known "Webster's" dictionaries of the complainant, which enjoy an established authority and reputation, and for which there is a steady call in the market created by complainant's labor, skill and expenditures.

The defendant's answer.

The answer (1) denies that the name Webster has acquired any secondary meaning in connection with dictionaries, or that it indicates the dictionaries of the complainant, (2) contends that the expiration of the

¹*Bill of Complaint, Rec. vol. I, pp. 1-78.*

copyright upon the early dictionaries in the Webster series has rendered the name Webster as applied to dictionaries wholly *publici juris*, and authorizes its use as the title of any dictionary that contains any part of the literary contents of the dictionaries of which Noah Webster was the author or proprietor, and (3) asserts that defendant's dictionary was revised from the 1847 edition of "Webster's Unabridged Dictionary," and is, therefore entitled to be called, *simpliciter*, "Webster's Dictionary." Fraudulent intent is denied, although the acts charged are admitted.¹

The decision below.

The court below found that defendant's book was copied from the British Empire Dictionary (*alias* "Crown Dictionary") with which it was substantially identical; that the British Empire Dictionary was in turn "based" upon still another British dictionary entitled "Ogilvies Imperial Dictionary" of 1883; that this last named book was a revision of an earlier edition of the same name issued in 1850, and that this early edition was based upon some early Webster's Dictionary, not specifically identified. The court assumed, for the purposes of this case, that the name "Webster" had acquired a secondary meaning, and had come to indicate *prima facie* the dictionaries of complainant. The Court then found that "the defendants had the qualified right to call their books 'Webster's', provided they properly distinguished so as to cut out the secondary meaning." But instead of giving effect even to this limited finding, the Court dismissed the bill, thereby absolving defendant from any

¹See *Answer, Rec. vol. II*, pp. 952, 957.

duty to distinguish, and thus adjudging for all time that defendant has an unqualified right to sell this British dictionary as the modern well known Webster's Dictionary of complainant, and also the right to continue the fraudulent advertising which Judge Coxe had enjoined on the preliminary motion. The Court below took the extraordinary position that bringing this suit to judicially determine the right of this British book to bear the name "Webster's" was illegal; that complainant should be penalized for not accepting, in advance of judicial determination, defendant's offer to use a certain form of alleged distinguishing notice, as the limit of complainant's rights, and for insisting that this particular book had no right to be called "Webster's"; that because complainant did not acquiesce in defendant's construction of complainant's rights, the Court would "not inquire whether it gives the fullest protection to which the complainant is entitled." (*Rec. vol. III, p. 2068.*) The bill was thereupon dismissed, although concededly defendant had been violating complainant's rights even as defined by the court below, and although defendant by its answer claimed a right to continue such wrongful conduct.

State of the evidence.

There is substantially no conflict in the testimony, though the parties differ widely as to what the uncontradicted testimony and exhibits actually show. The facts are summarized and discussed in the following points. For convenience of reference, an abstract of the testimony upon the controverted points is given in an appendix.

II.

SPECIFICATION OF ERRORS.

The specific errors assigned in the record and now relied on (*vol. III*, pp. 2097, 2098) may be summarized as follows:

FIRST: That the complainant was entitled to a decree, (1) enjoining the defendant from using the name "Webster" as part of the title or common short name of the British Empire Dictionary, sometimes called "Crown Dictionary", (2) requiring the defendant to use an adequate distinguishing statement in connection with any use of the word "Webster" as descriptive of its dictionary in order to prevent deception, (3) restraining deceptive and fraudulent advertising and unfair methods of competition, and (4) enjoining the infringement of complainant's registered trade-marks.

SECOND: That complainant was entitled to an accounting of damages and profits resulting from the unfair and wrongful acts of defendant.

III.

BRIEF OF THE ARGUMENT.

I.

Under the doctrine of unfair competition use of a name to pass off one person's goods as and for those of another will be enjoined, even though complainant has no exclusive proprietary right in the name (*Point I, post*, p. 9 *et seq.*).

II.

The name "Webster's Dictionary" has acquired a secondary meaning, and now identifies and indicates

the books of complainant's series; defendant's use of the same name as the title of its dictionary is deceptive and should be enjoined (Point II, *post*, p. 13 *et seq.*).

III.

Defendant's book is a reprint of the "British Empire Dictionary," an English work, not even "based" on any edition of Webster's Dictionary; it is not a genuine Webster's Dictionary in any sense of the term (Point III, *post*, p. 64 *et seq.*).

IV.

Defendant has fraudulently misused the name "Webster's" on its books and in its advertisements; an injunction should have been granted. (Point IV, *post*, p. 89 *et seq.*).

V.

Defendant cannot justify its use of the name "Webster's" by asserting the expiration of copyright upon the 1847 edition, because: (1) defendant does not publish the expired edition, or even a revision of it, and (2) the title and generic name of the expired book is "An American Dictionary,"—not "Webster's Dictionary" (Point V, *post*, p. 112 *et seq.*).

VI.

Secondary meaning names are protected by an absolute form of injunction against a false or unnecessary manner of use, and in other cases by a qualified injunction requiring an adequate explanation to accompany the name (Point VI, *post*, p. 124 *et seq.*).

VII.

Defendant has infringed complainant's registered trade-marks, of which the name "Webster's" is the distinctive feature (Point VII, *post*, p. 137 *et seq.*).

VIII.

Complainant has been guilty of no laches, but on the contrary has been vigorously litigating its rights in the name "Webster's" since prior to defendant's infringement, of which defendant had actual notice before it began its infringement (Point VIII, *post*, p. 142 *et seq.*).

IX.

Complainant has been guilty of no inequitable conduct; its hands are clean (Point IX, *post*, p. 147 *et seq.*).

X.

The usual accounting should be directed (Point X, *post*, p. 160 *et seq.*).

POINTS.

I.

THE DOCTRINE OF UNFAIR COMPETITION.

The law of unfair competition, which is the basis of the law of technical trade-marks, rests upon the principle of business morality that one person will not be permitted to pass off his goods as those of another who has succeeded in establishing a reputation for

the quality of his goods. The reason for the rule is that the reputation and good-will which a particular proprietor succeeds in establishing for his own goods and methods of dealing are his property,¹ and are entitled to protection as any other property.² *McLean v. Fleming*, 96 U. S., 245. The means by which one man's goods are passed off as those of another are wholly immaterial, because it is unlawful to produce that result by any means.³ "The most innocent objects," as this court has said, "may be used for unlawful purposes." *Kalem Co. v. Harper Bros.*, 222 U. S., 55. "Unfair competition does not necessarily involve the violation of any exclusive right to the use of a word, mark, or symbol. It may arise from the use of words, etc., which everybody may use. The question is whether what is done in a special case tends to pass

¹Coxe, J., said in *Clark Thread Co. v. Armitage*, 67 Fed. 896, 900: "The demand is for the complainant's thread, and, though other thread is used to a limited extent, it is not too much to say that in certain localities the market belongs to the complainant. It has taken capital, industry and years of arduous endeavor to produce this result. If the complainant had not dealt honestly with the public it would not be in this position today. Its success is due to the fact that for a generation it has furnished an article in which the people had faith. This good will is the complainant's inheritance and its property. It is as much a part of its assets as its mill or its counting house. No one has a right to destroy it except by fair and honest competition. No other manufacturer has a right to take away the complainant's customers by inducing them to believe that they are purchasing the complainant's goods."

²*Reddaway v. Banham*, [1896] App. Cas. 199.

³"Equity does not concern itself as to what the means, how, or with what intent they are used, if the result is fraud, and, if the public are induced thereby to purchase the goods of one under the belief that they are those of another, such means will be enjoined." *Bates Mfg. Co. v. Bates Numbering Machine Co.*, 172 Fed. 892, 895.

off the goods of one for those of another, or tends to deprive such other of his rights."¹ *McLean v. Fleming*, 96 U. S., 245.

The exclusiveness or non-exclusiveness of a complainant's right in a trade name used as the instrument of harm merely affects the form of the relief which will be granted. If the right be exclusive, as in the case of technical trade-marks, an absolute unqualified injunction will be granted and infringement in any form will be enjoined. If the right be not exclusive, as in the case of generic, geographical, or personal names, the injunction will merely regulate the defendant's manner of using the trade name so as to prevent deception. The court will then prohibit any untrue, unnecessary, or inappropriate manner of use which unduly injures the complainant, and will require the defendant to adopt reasonable precautions to prevent confusion, and consequent damage, from any reasonably necessary or proper use, but will leave him at liberty to use the word in any manner which is honest and fair and not calculated to deceive the public. In short, use will be permitted; abuse will be enjoined. These rules are well established and have been often applied.

Thus, although no one can acquire an exclusive right in a geographical name, such a name may acquire a trade significance, termed "a secondary meaning", which will be protected by injunction against any misleading manner of use by a rival trader. *French Republic v. Saratoga Vichy Springs Co.*, 191 U. S. 427 ("Vichy"); *Elgin Watch Co. v. Illinois Watch*

¹*Bates Mfg. Co. v. Bates Numbering Machine Co.*, 172 Fed. 892, 895. See also *American Tobacco Co. v. Polacsek*, 170 Fed. 117, 121.

Co., 179 U. S. 665 ("Elgin Watches"); *Shaver v. Heller*, (C. C. A.) 108 Fed. 821, 832, ("American Ball Blue"); *Pillsbury Washburn Flour Mills Co. v. Eagle*, (C. C. A.) 86 Fed. 608, ("Minneapolis Flour"); *Wotherspoon v. Currie*, L. R. 5, H. L. 508, ("Glenfield Starch").

The same rule applies to the use of personal names. No one has an exclusive right to the use of his own name as against another person of the same name. But the right to use one's own name is not superior to the obligation of using it honestly, and so as not unduly to injure another, and injunctions are, therefore, often granted regulating a man's use of his own name, and prohibiting its use in such a manner as to confuse his goods with those of another in the public mind. *Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.*, 208 U. S. 554, ("Hall's Safes"); *L. E. Waterman Pen Co. v. Modern Pen Co.*, 35 Sup. Ct. Rep. 91 (not yet officially reported); *Jacobs v. Beecham*, 221 U. S. 263; *Thaddens Davids Co. v. Davids*, 233 U. S. 461; *International Silver Co. v. Rogers Corp.*, 67 N. J. Eq. 646. In fact, even generic descriptive words, such as "Camel's Hair Belting", will be protected by injunction where they have acquired a trade significance, and defendant's manner of using them is deceptive, unfair, or dishonest. *Reddaway v. Banham*, (1896) App. Cas. 199, which has been repeatedly cited with approval in many American cases. "Singer Sewing Machines" is a notable instance. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169.

If, therefore, the name "Webster" has acquired a secondary meaning and come to be the designation of complainant's dictionaries, as the court below assumed to be the fact, then complainant is entitled to

some form of relief against defendant's deceptive misuse of that name.

II.

THE NAME "WEBSTER'S DICTIONARY" HAS ACQUIRED A SECONDARY MEANING AND A TRADE SIGNIFICANCE, IDENTIFYING AND INDICATING COMPLAINANT'S BOOKS, AND DEFENDANT'S USE OF THAT SAME NAME AS THE TITLE OF ITS DICTIONARY IS DECEPTIVE AND SHOULD BE ENJOINED.

This case is unique in the fact that defendant's use of the term "Webster's Dictionary" is false and deceptive in *both* its primary and secondary sense. Usually the right to relief is based wholly upon a secondary meaning.

In both a primary and a secondary sense the name "Webster's Dictionary" now indicates to the public the complainant's dictionaries. All of complainant's current books are published and copyrighted under the name or title of Webster's Dictionary, some additional descriptive word like "Condensed", "Academic", "High School", etc., being usually added to indicate the particular variety or size.¹ Complainant's publications under the name of "Webster's Dictionary" have been long on the market and are well known and universally called for by that name. The primary

¹In the *Singer* case (163 U. S. 169, 179), the Supreme Court in holding that the name "Singer" was the generic name of all varieties of complainant's machines said: "This conclusion is not shaken by the contention that, as many different machines were made by the Singer Manufacturing Company, therefore it was impossible for the name Singer to describe them all, because the same designation could not possibly have indicated many different and distinct things. The fallacy in the argument lies in failing to distinguish between genus and species."

meaning of the term "Webster's Dictionary", therefore, is the current dictionary of that name, a book-title being the generic description of the particular book. In a secondary sense, the term "Webster's Dictionary" also means that any book bearing that name comes from the same source, and has the same qualities, and is entitled to the same authority and reputation as the other well-known Webster dictionaries.

Question not decided below.

It was assumed, but not decided, by the courts below, that Webster has acquired the secondary meaning contended for by complainant. Thus Judge Hand said:

"I have decided this case upon the assumption that the word 'Webster' had acquired a secondary meaning indicating at once the derivation of the work, and its responsible compiler. That assumption I make in deference to the decision in the First Circuit, though it is no sense authoritatively binding upon me. . . . That question I leave exactly as I find it, without deciding that the meaning exists, that it does not exist, that it has been proved, or that it has not been proved" (*Rec.*, vol. III, pp. 2068, 2069; 2094).

The fundamental question in this case has thus not been decided, and it becomes necessary to summarize the evidence upon this point. For convenience of reference and verification this evidence is abstracted and stated more in detail in the annexed appendix.

Evidence of secondary meaning.

The fact that the name "Webster's Dictionary" had acquired a distinct secondary meaning and trade

significance, identifying the complainant's publications, was abundantly established, without substantial contradiction, by every kind of evidence usual in these cases, including (a) prior adjudications, (b) prior, long, extensive, continuous and exclusive use, (c) great reputation and authority resulting in large sales, (d) numerous instances of actual deception of purchasers and other evidence of deception and confusion, (e) evidence of booksellers, scholars, educators, publishers and proof-readers. Indeed, the court judicially knows that there has been for many years a well-known Webster's Dictionary of high standing and reputation. *Adler v. The State*, 55 Alabama, 16, 23, where the court, per STONE, J., said:

We can perceive no good reason why a work of such standard authority as *Webster's Unabridged Dictionary* confessedly is, should not be used before a court or jury, whenever the meaning of an English word is brought in question. That it is a work of standard authority, is so widely known; indeed, so universally acknowledged wherever the English language is spoken, that it must be classed among the facts judicially known."

It is uncontroverted that complainant and its predecessors have always been the proprietors of this well-known work. This alone is sufficient to entitle complainant to relief against a misleading or deceptive use of the name "Webster's" in any part of the title of defendant's "British Empire," or "Crown" dictionary. It is not the book which will be judicially noticed, though it masquerades under the same name.

(A) *Prior adjudications.*

Prior adjudications in suits against other infringers have invariably found that the words "Webster's Dic-

tionary" had acquired a so-called secondary meaning and meant the complainant's publications, and have uniformly granted relief upon that theory.

In 1892 Judge Shipman found and declared that the words "Webster's Dictionary" indicated the complainant's dictionary current at that time. *Merriam v. Texas Siftings Pub. Co.*, 49 Fed. 944.

In 1906, Judge Colt, in the First Circuit, found and declared that the name "Webster", as applied to dictionaries, indicated the dictionaries then being published by the complainant, saying:

"It further appears from the evidence that from 1847 to 1889 the Merriams were the sole publishers of Webster's dictionaries, and that in 1889 the name 'Webster', as applied to dictionaries, had acquired a secondary meaning and indicated to the public the dictionaries published and sold by the Merriam Co. It further appears that since the expiration of the Merriam copyright in 'Webster's Unabridged Dictionary' in 1889, various editions of Webster's Dictionary have been published and sold by other publishers; but notwithstanding this circumstance, *it is shown by a preponderance of evidence that the name 'Webster' still indicates to the public the dictionaries published and sold by the Merriam Company.*" *Ogilvie v. Merriam*, 149 Fed. 858, 860, *affirmed* 159 Fed. 638.

All the evidence upon which the above finding was made, not purely cumulative, was reproduced in the case at bar, and much new and additional testimony to the same effect was also offered.

In 1911, the Circuit Court of Appeals for the Sixth Circuit again found that the words "Webster's Dictionary" indicated complainant's publications, and di-

rected an injunction against a misleading manner of using that name. This was reaffirmed upon the rehearing in 1912, when it was said that the secondary meaning had in fact become the primary meaning. The finding in the First Circuit was approved and followed, the court saying:

"It was found that the term 'Webster's Dictionary' had in the minds of the dictionary public *the meaning that the book so named or marked was the Merriam book*; and this finding may well rest upon sufficiently exclusive use, with public acquiescence, from 1889, when the copyright expired, till 1904 when Ogilvie published."

In the case at bar, upon the motion for a preliminary injunction, which was granted, Judge Coxe, said:

"This name by long association with the Merriams has acquired a secondary meaning and indicates to the public that a dictionary sold under the name of 'Webster' is published by the Merriams." (Not reported.)

It thus appears that for a period of almost twenty-five years last past, and until the decision below, complainant has been judicially protected in its enjoyment of the secondary meaning of the name "Webster's" and in the good will and reputation attached thereto created and earned by complainant.

(B) *Long, prior, extensive, and exclusive use.*

Complainant is the direct successor of Noah Webster in the business of compiling and publishing dictionaries. This series of dictionaries and the business of publishing them began in the year 1806, and has been continued by complainant and its predecessors

without cessation until the present time.¹ The facts with respect to every book are given in the Appendix annexed to this brief. (*Post.*)

In 1806 Noah Webster compiled and copyrighted a small dictionary entitled "A Compendious Dictionary", and published it with the title "Webster's Dictionary" upon the cover. This was the first Webster's Dictionary. In 1807, he compiled and copyrighted another small dictionary entitled "A Common School Dictionary." He then entered upon the preparation of his famous complete or unabridged dictionary, which he published and copyrighted in the year 1828. This work was entitled "An American Dictionary", for the purpose of emphasizing its distinctively American as distinguished from British characteristics,² but upon its cover it was entitled simply "Webster's Dictionary", by which name it was known in its time, and by which name every subsequent edition or revision has been likewise known. Immediately upon the publication of his large unabridged dictionary, Webster began the preparation of a series of small abridgments from it, and these abridgments were published and copyrighted by him as follows:

1828. Webster's Primary School & Counting House Dictionary.

1829. Webster's Dictionary. ("Octavo Abridgment").

1833. Webster's Primary Dictionary.

1837. Webster's High School Dictionary.

1841. Webster's Dictionary. ("Octavo Abridgment", New Edition.)³

¹See title pages and copyright certificates, *Rec. vol. I*, pp. 671 to 781. See also "Abstract of testimony" in Appendix, *post*, p. 1 *et seq.*

²See Webster's preface to Edition of 1828.

³See Abstract of Testimony in Appendix, *post*, pp. 1-8.

In 1840 Noah Webster prepared, published and copyrighted a new and revised edition of his unabridged "American Dictionary" of 1828. This was likewise entitled, upon the cover, "Webster's Dictionary," and took the place of the previous edition of the same work. In 1843 this book was republished with a supplement, and in that year Noah Webster died.¹

The Webster heirs forthwith pooled their interests and authorized the executors to act at their discretion for the joint benefit of all.² In 1843, G. & C. Merriam purchased from the Webster estate the unsold remainder and the copyright of Webster's Unabridged Dictionary,³ and immediately began the preparation of a new and revised edition of it, which was completed, published and copyrighted by them in the year 1847. By this time Webster's Dictionary had acquired a great reputation, and the book had become a standard authority in this country as to definition, spelling and pronunciation. This reputation and good will went with the work to the Merriams, and was continued and increased by their 1847 and subsequent editions.⁴

In the meanwhile, the abridged "Webster" dictionaries above referred to, continued to be published and sold under the Webster copyrights and licenses, and Webster's estate prepared and copyrighted cer-

¹*Rec. vol. I*, pp. 676, 725, and see Dictionary filed as exhibit.

²See "Delegation of Power to Executors by Heirs." *Rec. vol. I*, p. 809.

³See preface to Webster's International Dictionary, and "Early Contracts and Assignments," *Rec. vol. I*, pp. 783 *et seq.*

⁴This is shown by practically all the witnesses. See *Rec. vol. I*, fols. 404; 749; 722; 809; 839; 1022; 1186; 1263; 1294; 1330-1337; 1361; 1365; 1424; 1453-1455; 1560; 1561; 1567; 1867-1869; 1873-4; 1890-1; 1928-1930; 2000. See also Exhibit, "Webster in the Courts," *Rec. vol. I*, p. 853 *et seq.*

tain new or revised editions of such abridgments as follows:

Webster's Academic Dictionary.

Webster's University Dictionary.

Webster's Pocket Dictionary.

Webster's Dictionary, ("Octavo Abridgment", 3rd Ed.)¹

In 1853, three years before the expiration of the copyright upon the original Webster's Unabridged Dictionary of 1828, which was the basic copyright of the whole series of "Webster's" dictionaries, and for the declared purpose of making a permanent arrangement, an agreement was entered into between Webster's children and Messrs. G. & C. Merriam, which is in evidence as the "Webster contract of 1853." By this agreement, the renewal copyright was sold and assigned to the Merriams, who were expressly authorized to make and copyright for themselves new and revised editions and abridgments. This was the first time such authority had been granted. Prior licensees had merely printed and sold, under royalty contracts, specific books prepared, copyrighted and owned by Webster, or his estate. In 1855, a supplementary and confirmatory agreement was made between the Webster heirs and the Merriams. As there were outstanding licenses under previous contracts with Webster or his estate, authorizing the publication of certain abridged dictionaries belonging to Webster's estate, G. & C. Merriam purchased and took an assignment of all such outstanding licenses and contracts, with the consent of Webster's Execu-

¹See Abstract of Testimony in Appendix, *post*, pp. 5, 6, 10. Also *Rec. vol. I*, pp. 676, 678, 732, 733, 734.

tors. The last outstanding license covered the "Octavo Abridgment" and the "University". This was held by Lippincott & Co., and they sold and transferred it in 1858 to the Merriams, who paid \$50,000 for it, and assumed the royalty payments to the Webster family.¹ The result of these various purchases and agreements was to vest in the Merriams all the rights of Noah Webster and his family as well as of his licensees to any dictionary ever written or published by Noah Webster. Complainant is thus the successor, not only of Noah Webster, but also of all his licensees.

From 1806 to 1847 every dictionary, large or small, bearing the name Webster, came from one common source, had one responsible supervision, and all were united in one common proprietorship—that of Noah Webster and his heirs. The Webster agreements transferred all these books, with whatever reputation and good will they had attained, to Messrs. G. & C. Merriam, of whom the complainant corporation is admittedly the corporate successor.² From that time on, for a period of forty-two years, the Merriams were the common source and the sole proprietors of all Webster dictionaries, both large and small, published in the United States. Under the sole direction, responsible supervision, and ownership of the Merriams, the Webster's Dictionary was developed and kept abreast of the times, reflecting and recording in its successive editions, revision and corrections, the rapid and wonderful advance in learning, science, invention and the useful arts.³

¹See "Early Contracts and Assignments," *Rec. vol. I*, pp. 783-812, and Abstract of Record in Appendix, *post*, pp. 3, 4.

²See also "Chronological Statement of the Publication of 'Webster' Dictionaries," in Abstract of Record in Appendix, *post*, p. 1 *et seq.*

³See *Abstract of Testimony* in Appendix, *post*, pp.

Beginning in 1847, and continuing down to the present date, the Merriams have compiled, published, copyrighted and owned a long line of "Webster" dictionaries, both unabridged and abridged. Each successive edition was based upon, and was a revision and an enlargement or abridgment of preceding editions. The full list, with copyright dates, is given in a foot-note.¹ The latest editions of each of these publications are the dictionaries now being sold by complainant, and each of these publications of the com-

¹*Complainant's Publications.* (Rec. vol. I, pp. 667-781).

- 1847. Webster's Dictionary, Unabridged.
- 1856. Webster's Academic Dictionary.
- 1856. Webster's School Dictionary.
- 1856. Webster's High School Dictionary.
- 1856. Webster's Counting House & Family Dictionary.
- 1857. Webster's High School Dictionary, (Revised Edition).
- 1859. Webster's Dictionary, Unabridged.
- 1860. Webster's Dictionary. "Octavo Abridgment."
- 1863. Webster's Army & Navy Dictionary.
- 1864. Webster's Dictionary, Unabridged.
- 1867. Webster's Primary Dictionary.
- 1867. Webster's Academic Dictionary.
- 1867. Webster's Common School Dictionary.
- 1867. Webster's People's Dictionary.
- 1867. Webster's New Counting House & Family Dictionary.
- 1868. Webster's High School Dictionary. Revised Edition.
- 1869. Webster's Pocket Dictionary.
- 1875. Webster's Dictionary, Unabridged.
- 1877. Webster's Handy Dictionary.
- 1879. Webster's Dictionary, Unabridged. New Edition with Supplement.
- 1884. Webster's Unabridged Dictionary, Subscription Edition with Historical Supplement.
- 1884. Webster's National Pictorial Dictionary.
- 1884. Webster's Condensed Dictionary.
- 1884. Webster's Practical Dictionary.
- 1886. Webster's National Pictorial Dictionary. Subscription Edition, with Compendium.
- 1890. Webster's International Dictionary, Unabridged.
- 1892. Webster's High School Dictionary.

plainant is known to the public under the short name of Webster's Dictionary.¹

Since the death of Noah Webster in 1843, the Merriams have four times revised and enlarged Webster's Unabridged Dictionary by adding thousands of new words which have come into use and by revising old definitions of words as modified by modern usage. These were the editions of 1847, 1864, 1890 and 1909. After each revision, new abridgments were made, taking the place of the old and keeping the small dictionaries in conformity with the latest unabridged edition.²

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- 1892. Webster's Primary School Dictionary.
 - 1892. Webster's Common School Dictionary.
 - 1895. Webster's Academic Dictionary.
 - 1896. Webster's Counting House Dictionary.
 - 1898. Webster's Collegiate Dictionary.
 - 1898. Webster's International Dictionary. "Australasian Edition."
 - 1898. Webster's International Dictionary. "Historical Supplement."
 - 1900. Webster's International Dictionary. "New Edition with Supplement."
 - 1903. Webster's Unabridged Dictionary, with Appendix and Supplement.
 - 1905. Webster's Little Gem Dictionary.
 - 1905. Webster's International Dictionary, "Australasian Edition."
 - 1906. Webster's Condensed Dictionary.
 - 1906. Webster's Practical Dictionary.
 - 1909. Webster's Condensed Dictionary.
 - 1909. Webster's New International Dictionary, Unabridged.
 - 1910. Webster's Collegiate Dictionary, with Supplement.
 - 1910. Webster's Practical Dictionary.
 - 1911. Webster's Little Gem Dictionary.

This list does not include any of the earlier books which were assigned to the Merriams. It is limited to books first and continuously published, copyrighted and owned by the Merriams themselves.

¹See "Abstract of the Testimony" in Appendix, *post*, pp. 41 *et seq.*

²See "Chronological Statement of the Publication of 'Webster' Dictionaries," Abstract of Testimony in Appendix, *post*, pp. 1 *et seq.*

The evidence shows that the Merriams secured for their books the best results of the highest scholarship. Thus, the series has been built up and developed by a long line of distinguished editors, scholars and contributors, among whom may be named: Chauncey A. Goodrich, Professor at Yale, the son-in-law of Noah Webster; Noah Porter, President of Yale; Prof. William D. Whitney; Daniel C. Gilman, President of Johns Hopkins; Professors Edward S. Sheldon and Leo Wiener of Harvard; Arthur T. Hadley, President of Yale; Dr. W. T. Harris, United States Commissioner of Education, and George L. Kittredge of Harvard. Through these men and their co-workers, the Merriams have built up the Webster's Dictionary from a vocabulary of 70,000 words defined by Noah Webster, to 114,000 words defined in the revision of 1864; to 175,000 words defined in the revision of 1890; to 200,000 words defined in the edition of 1900; and to about 400,000 words and phrases in Webster's New International Dictionary of 1909.¹ Their literary labors alone have cost the Merriams the sum of one million one hundred thousand dollars (\$1,100,000) since the 1847 edition was superseded.² As a result, the Webster Dictionaries of complainant have become a standard authority of the English language in every civilized country of the globe.³

In addition to the large sums (\$1,100,000) expended by the Merriams for the literary work of their revised editions, they have spent an additional sum of over \$1,900,000 in advertising their Webster diction-

¹See Prefaces to Webster's International Dictionary of 1890, and Webster's New International Dictionary of 1909.

²*Washburn, Rec. vol. I, fol. 534.*

³*Washburn, Rec. vol. I, p. 134.*

aries under that name; more than 86,000,000 circulars, in addition to newspaper and magazine advertising, have been distributed, and for many consecutive years more than \$50,000 annually has been spent for advertising. In short, the name and reputation of Webster's Dictionary has been built up by complainant and its predecessors through more than sixty years of effort, and at a cost of over \$3,000,000.¹

More than 12,000,000 copies of complainant's Webster dictionaries have been sold since 1864, and for many years these dictionaries have been the officially adopted standard dictionary authority for school use. This school use has been practically universal, covering every section of the country, and almost every witness in the case dates his first knowledge of Webster's Dictionary from his use of it in his school days.² In buying defendant's book they thought they were getting this standard work, and so testified. Of course, they were deceived. No Webster dictionaries other than complainant's have been thus adopted and used in the schools.³ Moreover, the various courts of the country have for many years used complainant's dictionaries as a standard authority, citing them as "Webster's Dictionary," which has always indicated the complainant's publications.⁴

This long, prior, extensive and exclusive use of the name "Webster" in the title of dictionaries, the reputa-

¹*Washburn, Rec. vol. I, fols. 532-534.*

²*Washburn, Rec. vol. I, fols. 859-887; 707-712.* In *Doan v. American Book Co.*, (C. C. A.) 105 Fed. 772, 777, Jenkins, C. J., said: "It is the duty of a court of equity to protect these children from imposition."

³*Rec. vol. I, fols. 883-887.*

⁴See Exhibit—"Webster in the Courts," *Rec. vol. I, pp. 853-888; Van Dyck, Rec. vol. I, pp. 335-337.*

tion and intrinsic merit of the books, and the great sales and extensive use of these books in the homes and schools of the country, have necessarily given the name "Webster" a trade significance as applied to dictionaries. At any given date, these words in the title of a dictionary have had the meaning of a dictionary of the established series prepared under the responsible supervision of the same interests that had prepared the previous editions of the work of that name. This is and has always been the natural and well understood meaning of the name "Webster's" as used in the title of dictionaries. Many actually deceived purchasers of defendant's book so testified,¹ and there is much other evidence establishing the fact.²

(C) *Authority, reputation, and character of respective books as a means of deception.*

The court will take judicial cognizance of the high standing, reputation and authority of Webster's Dictionary as a work of reference (*Adler v. State*, 55 Ala. 16, 23), but, if not, that fact has been directly testified to by substantially all the witnesses. The dictionary which has this reputation and authority is the dictionary of complainant, G. & C. Merriam Company, and no other.³ The small or abridged Webster's dictionaries conform, and are expected to conform, to the large or unabridged edition which is the ultimate authority in-

¹Lutz, fols. 1185-1189, 1192; Burlingham, fols. 1272-1277; Crossman, fol. 813; Foley, fols. 1115-1121; Newberry, fol. 1620; McMahon, fol. 1226; Timms, fols. 1368-1369, 1375; Fisher, fol. 1340; Hughes, fols. 1287-1289.

²See *Abstract of Testimony* in Appendix, *post*, pp. 41 *et seq.*

³*Rec. vol. I*; Putnam, fols. 1560, 1561; Funk, fols. 1453-1455; Martin, fols. 1928-1930; Mead, fols. 1890-1891; Wadlin, fols. 1867-1869; Draper, fols. 1999-2002; Van Dyck, fols. 1330-1337.

voked by the name "Webster." They contain the results of the same scholarship, and so far as consistent with the size and scope of the book, contain the same literary contents as the larger books.¹ Many deceived purchasers testified that they bought defendant's book thinking that it was an abridgment of the current, genuine Webster's Dictionary, unabridged.² Practically every witness in the case has referred to the great reputation of Webster's dictionaries, and deceived purchasers relied upon that reputation as a guaranty of excellence when they bought defendant's book stamped with that name.³ They were, of course, deceived when they did not get the book with the Webster reputation, but instead got the "British Empire," *i. e.*, the "Crown" Dictionary. They were none the less deceived, whether or not the book was remotely descended from, or connected with an early genuine "Webster's Dictionary", especially in view of the fact that it is, under the decision below, five generations removed from the alleged common ancestor, no one of which bore the name Webster within a period of over sixty years. The genealogy of this book, as now claimed for defendant, is: (1) "Webster's

¹*Rec. vol. I, Washburn*, fols. 709, 705; *Van Dyck*, fol. 1351; *Putnam*, fols. 1568, 1569. "The smaller dictionaries are considered as abridgments of the large work, but with exactly the same nature and authority of statement" (fols. 1568, 1569). "They assume that the small school editions used by them are merely the epitome of the exhaustive work, kept revised and just as accurate and up to date as the large work. They assume that if their teacher who has the International [*i. e.* Webster's] Dictionary on his desk for reference, gives them the abridged book to work from, that he is not giving them a book which will not agree as to statements with the exhaustive work" (fols. 1579, 1598).

²*Rec. vol. I; Seybel*, fols. 1404-1405; *McMahon*, fols. 1237-1239; *Hughes*, fol. 1295; *Haymaker*, fols. 1504, 1505, 1536.

³See *Abstract of Testimony* in Appendix, *post*, pp. 41 *et seq.*

New Standard Dictionary" (1908-1911), which was a reprint of (2) "The Crown Dictionary" (1904-1908), which was a reprint of (3) "The Student's Imperial Dictionary" (1899-1904), which was a reprint of (4) "The British Empire Dictionary" (1899-1904), which the Court below found was based in some degree upon (5) the 1883 edition of the English "Imperial Dictionary" (1850-1889), of John Ogilvie, which the court below found was based upon (6) "Webster's Dictionary" of 1847 or prior date.¹

Surely the court below erred in finding it to be immaterial that "the intermediate sources did not go by the name Webster" (*Rec. vol. III*, p. 2064), because the present authority and reputation of Webster's Dictionary rests upon the "intermediate" editions of complainant, and the direct, uncontradicted evidence from witnesses on both sides is that "when the public uses 'Webster'", it does "understand that all the intermediate steps shall have been so named." Complainant's witness, Fisher, a school teacher, who was deceived into buying defendant's book, testified:

"Q. What do you mean by 'a real Webster'?

A. One that has been called nothing but a 'Webster'; always been a 'Webster' from the original Webster. . . . I don't see why they would ever call it anything but a Webster; I don't see what reason they would have to change the name of it. . . . I think if I started out to buy a 'Webster' I would not want one that had been called something else some other time. . . . If I thought it was ever called 'The Crown', I don't suppose I would ever have bought it,—if it had ever been called anything but a 'Webster'" (*Rec. vol. I*, p. 438).

¹See dictionary exhibits. See also *Opinion below*, *Rec. vol. III*, pp. 2062-2065.

Defendant's witness, Prof. Rolfe, also testified directly that a book of the literary descent and antecedents of defendant's book, as found by the court below, and above described, could not properly be described as a "Webster's Dictionary" (*Rec. vol. III*, pp. 2018-2021). For certainty we quote:

"Rd-Q. 142. If, for example, the editor of this book in Webster's Illustrated Dictionary had never seen Webster's 1847, but had compiled his book entirely from Ogilvie's Imperial Dictionary, and the result had been as it is in this book, such a large percentage of material identical with Webster, would you say that it was truthfully derived from or based on Webster's dictionary? A. *I should not think it would be a natural thing to do at all, that is, if the title Webster was not given to the Imperial Dictionary*; it does not seem to me that that would be a natural thing, to term it 'Webster' from the legal [literary?] point of view; on the ethical point of view, I am sure, but from a literary point of view I should not myself use the title 'Webster' under those circumstances."

"Rx-Q. 146. If a new dictionary was compiled today, using as its main sources Cassell's English Dictionary, Chamber's English dictionary, and Ogilvie's English dictionary with more or less consultation of all other standard dictionaries, would it be in accordance with the rules and opinions which you have declared to call such a new book, 'Webster's' dictionary? A. I should think not."

Prof. Rolfe also testified that it would not be proper to re-entitle the well-known "Standard" and "Century" dictionaries, and call them "Webster's." Yet the Standard Dictionary was revised directly from Webster's Dic-

tionary of 1847, as its publisher, Dr. Funk, testified,¹ and the Century Dictionary is a revision of the Imperial Dictionary of John Ogilvie.²

Prof. Rolfe's testimony is misapprehended and misstated in the opinion below (*Rec. vol. III*, pp. 2064-5). It supports and corroborates complainant's case. But wholly apart from such testimony, it obviously does matter to purchasers who buy dictionaries in reliance upon good reputation as an assurance of worth, as all must, whether or not the book given them is the book of the name which earned and possesses that good reputation. The Webster reputation is associated only with the complainant's books, and was built up during the period when defendant's book, and its ancestors bore another name, under which it earned no reputation of its own.

It also appears, without contradiction, that it is the recent and *current copyrighted dictionaries* of the complainant which are the books used in the schools and courts, and which have the reputation and authority invoked at the present time by the name "Webster's Dictionary." This reputation and authority rest mainly upon the later editions, and especially upon Webster's International Dictionary of 1890.³ Language changes, and the dictionaries of fifty or sixty years ago have long since become obsolete and insufficient, and gone out of use. A new dic-

¹*Rec. vol. I*, p. 363.

²See said dictionaries. The Century Dictionary contains the following statement on the back of its title-page:—"By permission of Messrs. Blackie & Son, publishers of The Imperial Dictionary by Dr. Ogilvie and Dr. Annandale, material from that English copyright work has been freely used in the preparation of The Century Dictionary."

³*Rec. vol. I*, Mead, p. 473; Martin, p. 458; Van Dyck, p. 335; Putnam, p. 392; Wadlin, p. 469; Draper, p. 500.

tionary which was known to have skipped over all the recent authoritative and copyrighted Webster dictionaries, and founded itself solely upon the early edition of 1847 would not have the authority and would not be the book which is understood and identified today by the name "Webster's Dictionary." The testimony to this effect is uncontradicted.¹ In fact, the court below declared that to describe a dictionary truthfully as "one of the original Webster's dictionaries . . . would probably destroy any possibility of its sale".²

This can only mean that "Webster's Dictionary" today does not *prima facie* mean, and is not understood to mean this ancient edition; that purchasers will not buy it, except under a misapprehension, and in the belief that it is complainant's developed work. Still less would they understand that name to mean a book merely indirectly "based" upon such old edition. An indirect and remote connection with an early and obsolete edition is the utmost found by the court below as a justification for defendant's appropriation of the good will and reputation of complainant's current copyrighted Webster dictionaries.

Defendant's dictionary, in striking contrast to complainant's famous books, has no authority, standing or reputation of any kind, and especially it has not, and is not entitled to have, the reputation and authority which the genuine Webster's dictionaries do have. No effort whatever was made by the defense to show that its book has any authority or reputation. The contrary

¹*Rec. vol. I, Putnam, p. 394; Funk, p. 365; Clarke, p. 486; Draper, p. 500; Martin, p. 458; Mead, p. 474; Van Dyck, p. 337; Wadlin, p. 468.*

²*Opinion below, Rec. vol. III, p. 2059.*

plainly appears. The defendant has spent its money in a sudden burst of deceptive and unfair advertising, but has spent little or nothing to produce a meritorious book. It appears from the testimony of defendant's president, Mr. Wright, that its book is printed from certain old plates of the Crown Dictionary without any substantial change or editorial work thereon (*Wright, Rec. vol. II*, pp. 1062, 1089-1091). He refused to state how much he paid for the copyright and plates of this book, but testified expressly that he regarded the copyright upon the text of the book as of no value whatever (*Rec. vol. II*, p. 1081). It also appears from his testimony that the main sale of the book has been as a *premium* used in connection with newspapers and magazines to promote circulation (*Rec. vol. II*, p. 1125). Books of established reputation and standing do not forfeit it by change of name. Defendant's book has frequently changed its name. This book without substantial change in its literary contents has borne successively all of the following names, viz:—"British Empire Dictionary," "Student's Imperial Dictionary," "Crown Dictionary," "Student's New Century Dictionary," and then it assumed the *alias* under defendant's auspices, of "Webster's New Illustrated Dictionary," subsequently changed to "Webster's New Standard Dictionary." And under the auspices of Cupples & Leon Co., defendant in the companion suit to this, the same book is sold concurrently under the *alias* of "Webster's New Century Dictionary." (See *Dictionary Exhibits*.) The book is also given away in large quantities as a premium with carbon and typewriter supplies, and with a title page containing an advertisement of those useful articles (*McCarthy, Rec. vol I*, p. 292).

It also appears that in many respects defendant's dictionary is a slovenly and inaccurate production. Defendant's expert, Professor Peck, has so characterized certain features (*Peck, Rec. vol. III*, p. 1672; 1667-1677). That this characterization of "slovenly" is deserved, appears from the errors and inaccuracies in spelling, definitions, and general misinformation pointed out in the book, among which may be mentioned the meaningless "mixed definitions," caused by a careless conveying of matter from the British Empire Dictionary into the Crown Dictionary, and carried forward into defendant's dictionary (*Mawson, Rec. vol. I*, pp. 522-540); also erroneous and inadequate definitions, which have been pointed out (*Washburn, Jr., Rec. vol. I*, pp. 198-202; *Baker, Rec. vol. I*, pp. 126-128); also the total omission of definitions caused by cross-references to words not contained or defined in the book (*Mawson, Rec. vol. I*, pp. 538, 539). Numerous other errors and inaccuracies have been pointed out by the testimony (*Rec. vol. I, Mawson*, pp. 522-540; *Washburn, Jr.*, pp. 198-202; *Baker*, pp. 126-128).

More important still is the fact that numerous words in defendant's dictionary are spelled according to the English form of spelling, where that form is different from the accepted American form of spelling such words, and which has been the correct American form ever since Noah Webster himself adopted it in his early dictionary. A list of those words is contained in the Record (*vol. I, Mawson*, pp. 524-529). From the standpoint of American use and authority, these words in defendant's dictionary are wrongly spelled. In some instances, in conveying the matter from the British Empire Dictionary into defendant's dictionary, the editor did change the spelling from the English

to the accepted American form, but he left a trail leading straight to his English source by, in a few instances, forgetting to change the alphabetical order of the words to conform to the change in spelling (*Rec. vol. I*, pp. 531, 532, *Mawson*, fols. 2123-2128).

Most people must take a dictionary on faith. They regard a thing as right because the dictionary so states it. When purchasers bought defendant's dictionary upon the reputation of "Webster's Dictionary," relying upon that name as a guarantee of accuracy and quality they were, of course, grossly deceived. For example, defendant's counsel upon cross-examination of some of the deceived purchasers brought out statements like the following: Webster means, "the correct spelling and definition of words" (*Rec. vol. I*, fol. 1372). "I considered the Webster's dictionary the one giving the correct spelling and definitions" (*Rec. vol. I*, fol. 1374). "Webster conveys the idea of literary excellence." "I was satisfied to accept the spelling and definitions of any word or words contained in it" (*Rec. vol. I*, fols. 1122, 1125). "I did not give spelling a thought taking it for granted that I was purchasing a genuine Webster's Dictionary in which the spelling was bound to be correct, and never having heard of a 'Webster's Dictionary' that was not genuine" (*Rec. vol. I*, fol. 1301).

Many others testified to the same effect. It is the universal idea of Webster's Dictionary, as shown by its great reputation and recognized authority. How then can a purchaser of defendant's book, who buys on the reputation of Webster's Dictionary, be otherwise than deceived when he obtains a book of different literary contents, and filled with erroneous spelling,

British definitions and other grammatical and linguistic misinformation? In short, defendant's book is not the Webster's Dictionary of authority and reputation, and therefore is not the book which purchasers expect to get when they buy it, and the use of the name, "Webster's" thereon is a false and fraudulent misrepresentation.

Several purchasers have testified that they were dissatisfied with defendant's dictionary because it did not contain words which they expected to find therein (*Rec. vol. I:—Kronvall*, fols. 846, 847; *Catharine*, fol. 1393; *Cowles*, fols. 409, 410).

The vast majority of purchasers, however, will accept and follow the erroneous information given by defendant's book, because they think it is the genuine Webster's Dictionary, and therefore is necessarily correct. Many persons have been deceived who will never discover the fact that they have been deceived.

(D) *Actual deception of purchasers and others.*

The best evidence of "secondary meaning," unfair competition, and infringement of trade-marks, is the testimony of ordinary and average purchasers who have been actually deceived, and have had passed off upon them defendant's book as and for complainant's book.¹

Twenty-two purchasers of defendant's dictionary were called as witnesses, and told for themselves how

¹A learned English Judge has said of this class of evidence: "If one case of actual deception is proved, there is no more to be said on either side. The case is at an end. Argument really only takes place where there is no proved case of actual deception," per Kekewich, J., in *Liebig Extract of Meat Co. v. The Chemists Co-operative Socy.*, 13 Rep. Pat. Cas. 635, affirmed on appeal, 13 Rep. Pat. Cas. 736.

they had been deceived.¹ More would have been unjustifiable cumulation. Complainant's field agents, covering a wide territory, testified to specific instances of deception which had come to their notice, and to direct loss of sales due to defendant's competition,² and there was other evidence showing actual deception and confusion from defendant's use of the title Webster's Dictionary.³ Some of the purchasers of defendant's dictionary testified that they bought in the belief that they were obtaining a dictionary of the Merriams whom they knew by name as the publishers of Webster's Dictionary.⁴ Every purchaser testified that it was the name "Webster's Dictionary" which induced him to buy defendant's book,⁵ and all of them testified

¹*Rec. vol. I:—Seybel*, fols. 994-1028; *Hughes*, fols. 1279, 1313; *Cooper*, fols. 444-477; *Cowles*, fols. 401-422; *Kronvall*, fols. 837-847; *Pulcifer*, fols. 825-835; *Clark*, fols. 748-776; *Crossman*, fols. 808-822; *Rogers*, fols. 778-790; *Smack*, fols. 1414-1446; *Catharine*, fols. 1385-1400; *Geldart*, fols. 1401, 1411; *Timms*, fols. 1360, 1377; *Burlingham*, fols. 1249-1273; *McMahon*, fols. 1206-1245; *Lutz*, fols. 1189-1197; *Foley*, fols. 1109-1150; *Gash*, fols. 1079-1108; *Fisher*, fols. 1733-1758; *Hagarty*, fols. 1759-1771; *Wells*, fols. 1661-1675; *Newberry*, fols. 1607-1626; *Boynton*, fols. 719-747; *Bond*, fols. 423-443; *Condit*, fols. 1550-1554.

²*Rec. vol. I: Adams*, fols. 1969, 1979-1990; *Haymaker*, fols. 1470-1546; *Robinson*, fols. 1628-1653; *Porter*, fols. 1677-1732; *Buddecke*, fols. 1030-1078; *Gifford*, fols. 954-973. See Abstract of Testimony in Appendix.

³See Abstract of Testimony in Appendix, *post*, pp. 41 *et seq.*

⁴*Rec. vol. I: Seybel*, fols. 994-1028; *Hagarty*, fols. 1759-1771; *Cooper*, fols. 444-477; *Pulcifer*, fols. 825-835; *Rogers*, fols. 778-790; *Cowles*, fols. 401-422; *Kronvall*, fols. 837-847; *Crossman*, fols. 808-822; *Clark*, fols. 748-776.

⁵See Abstract of Testimony, *post*, pp. 41 *et seq.* *Rec. vol. I: Hughes*, fols. 1311, 1294; *Kronvall*, fols. 1841, 1842; *Hagarty*, fols. 1768, 1769; *Seybel*, fol. 1002; *Fisher*, fols. 1743-1759; *Newberry*, fol. 1611; *McMahon*, fol. 1213.

that they bought the book without first examining it, relying solely upon the name "Webster" as an assurance of accurate and authoritative contents.¹ These witnesses say that they did not intend to buy the "Crown" dictionary and did not know that they had in fact bought it.² Most of them had never heard of the "Crown" dictionary, and some gave that as a reason for saying that they would not have bought defendant's book if they had known that it was merely a reprint of the "Crown".³ One witness had heard of the Crown, but did not intend to buy a copy of it.⁴ Another already had a copy of the "Crown" Dictionary at home and did not intend to buy another copy of it when he bought defendant's dictionary, but did intend to buy a "Webster's Dictionary".⁵ Many deceived purchasers did not know the specific name of the publisher or proprietor of the Webster dictionaries which they had long known as a standard work. They assumed that all Webster dictionaries came from one concern, and did not know that there were any so-called Webster dictionaries which were not produced by this definite concern whose name and address they did not know. They intended to buy the well known Webster's Dictionary, and decided to buy it because

¹*Rec. vol. I: Foley*, fols. 1115-1121; *Smack*, fols. 1419, 1424; *Lutz*, fol. 1197; *Hughes*, fols. 1291, 1301; *Pulcifer*, fols. 831-832; *Hagarty*, fols. 1768, 1769; *Seybel*, fols. 1003, 1023.

²*Rec. vol. I: Hagarty*, fols. 1770-1771; *Pulcifer*, fols. 834-835; *Cowles*, fols. 413-414; *Clark*, fols. 758-759; *Hughes*, fols. 1303-1304; *Fisher*, fols. 1743-1758.

³*Rec. vol. I: Pulcifer*, fol. 835; *Fisher*, fols. 1743-1758.

⁴*Rec. vol. I: Cowles*, fols. 413-414.

⁵*Rec. vol. I: Kronvall*, fols. 843-844.

of its great reputation.¹ They were deceived because they did not get the book they thought they were buying. They did not get a book which had that reputation and history. They got a book of different contents, and without the guaranty of excellence implied in the word "Webster's." This attitude of the public mind is well illustrated by the extracts from the testimony printed in the accompanying abstract.²

The evidence of purchasers who were actually deceived in buying defendant's book corroborated the testimony of complainant's salesmen and of disinterested booksellers. The latter, shown to have had wide and long experience in the retail sale of dictionaries, testified that to the general public the name, "Webster's Dictionary" means one of the current dictionaries known by that name, published and sold by the Merriam Company, and that the public has been widely deceived by *bogus* Webster dictionaries issued in recent years.³

A magazine which had finished publishing defendant's advertisement, in returning the plate or cut of defendant's dictionary, sent it by mistake to complainant at Springfield, Mass. The name "Webster" on the cut was the only thing to connect it with

¹*Rec. vol. I: Hughes*, fols. 1279-1313; *Lutz*, fols. 1189-1197; *Fisher*, fols. 1733-1758; *Smack*, fols. 1414-1446; *Timms*, fols. 1360-1377; *Geldart*, fols. 1401-1411; *Burlingham*, fols. 1249-1273; *Foley*, fols. 1109-1150; *McMahon*, fols. 1206-1245; *Newberry*, fols. 1607-1626. See also *Abstract of Testimony*.

²See *Abstract of Testimony* in Appendix, *post*, pp. 41 *et seq.*

³*Rec. vol. I: Adams*, fols. 1964-1995; *Buddecke*, fols. 1029-1078; *Clarke*, fols. 1937-1963; *Gifford*, fols. 953-994; *Haymaker*, fols. 1470-1546; *Porter*, fols. 1677-1732; *O'Neill*, fols. 1857-1864; *Robinson*, fols. 1628-1656; *Funk*, fols. 1448-1467; *Putnam*, fols. 1558-1604; *Wadlin*, fols. 1869-1875. See *Abstract of Testimony* in Appendix.

the complainant.¹ A bookseller of Boston testified that he received an order for a so-called "Webster's Sterling Dictionary," and not having the book in stock ordered a copy from G. & C. Merriam Co., because: "The name of Webster was called for on the dictionary."² This book is one of the bogus Webster dictionaries published by Saalfield which have been enjoined. Numerous letters containing orders and inquiries for spurious Webster dictionaries have been sent by mail to the Merriam Company. These letters are printed in the record,³ and they show the widespread deception and confusion by the use of the name "Webster" in advertisements, and the identification of the name "Webster" with the Merriam Company and its dictionaries. It is significant that so many of such letters should have been sent to the Merriams in view of the fact that the advertisements of these spurious Webster dictionaries must have always contained the name and address of the infringing dealer.

(E) *Educators, scholars, literary men, publishers, proof-readers, and book-sellers.*

A large number of prominent and disinterested educators, scholars, literary men, publishers, proof-readers and book-sellers have testified unanimously to the effect that the name "Webster's Dictionary" means the *current* dictionaries published by the Merriams, and no

¹*Rec. vol. I, fols. 478-486.* See also the plate itself, filed as an exhibit. As was said in a case where a defendant's imitation article was sent to the maker of the genuine article to be repaired: "Such a demonstration of fact is worth any amount of hypothesis." *Enterprise v. Landers*, 124 Fed. 923-927.

²*O'Neill, Rec. vol. I, pp. 465-6.*

³*Washburn, Rec. vol. I, pp. 136-158; 222-233.*

other. They testify to the great reputation and high standing of the Webster's dictionaries published by the complainant, and say, what is unquestionably true, that that reputation rests upon the *current* dictionaries of the complainant *now in general use*.

They all agree that the name "Webster's Dictionary" does not now refer to or mean the obsolete dictionary of the year 1847; that a reference to Webster's Dictionary would not today be understood to refer to the edition of 1847, and that an order to a book-seller for Webster's Dictionary would not today be properly filled by a copy of the edition of 1847. They also testify that a dictionary even though "based" upon the 1847 edition, but prepared by other than the established publishers of the existing well-known Webster's Dictionary, and not based upon or abridged from the intervening recent editions of Webster's Dictionary upon which the reputation and popularity of Webster's dictionaries now rests, would not have the authority, or be the book, generally understood and intended today by the term "Webster's Dictionary."¹

The theory of this line of testimony is simply this: A person buys a dictionary to use it as an authority upon questions of language. If he prefers the authority of the "Standard Dictionary," or of "Worcester's Dictionary," or of the "Century Dictionary," he buys one of those dictionaries. If he prefers the authority of "Webster's Dictionary" he buys a copy of "Webster's Dictionary," and naturally expects and de-

¹*Rec. vol. I: Putnam, p. 390; fols. 1557-1604; Funk, p. 362; fols. 1448-1468; Clarke, p. 485; fols. 1937-1963; Draper, p. 500; fols. 1997-2004; Martin, p. 457; fols. 1825-1856; Mead, p. 472; fols. 1887-1936; Van Dyck, p. 332; fols. 1325-1359; Wadlin, p. 467; fols. 1865-1886. See also abstract of this testimony in Appendix.*

sires to receive the book, which has the distinctive authority and reputation which caused him to select "Webster" rather than "Worcester," or the "Standard," or the "Century." Complainant's Webster's dictionaries admittedly and unquestionably are the books which have the authority and reputation which attach to Webster's Dictionary today. Defendant's book is an English book, not even "based" upon the 1847 edition. But even if it were in some degree based upon the 1847 edition of Webster's Dictionary, it still would not be the book which today has the reputation and standing which all agree the complainant's dictionaries have. A purchaser of defendant's dictionary buying in the belief that it is the famous and authoritative dictionary is unquestionably deceived and does not get the book he intended to buy. He intended to buy the Merriam Company's dictionary, and this is true whether or not he knows that Merriam is the name of the publisher of the dictionary which he likes and desires to buy.

Attention is specially called to the deposition of Irving Putnam of G. P. Putnam's Sons, the well known publishers and book-sellers. He is in a position to know; is absolutely indifferent between the parties, and his testimony is clear and convincing (*Rec. vol. I*, p. 390, fols. 1557-1604).

The testimony of Isaac K. Funk, president of Funk & Wagnalls' Company, who are the publishers of the well known "Standard Dictionary," complainant's chief competitor, is also entitled to great weight. His testimony shows that the name "Webster's" is universally understood to mean the Merriam Company's recent dictionaries, and that a new book by other publishers, even if in some part based upon the 1847 edition, would not be the book which is today understood as a Webster's Dictionary (*Rec. vol. I*, p. 362, fols. 1448-1468).

Defendant's opposing evidence and arguments on question of secondary meaning.

The existence of "secondary meaning" in any case is always purely a question of fact to be determined upon the evidence. *Howe Scale Co. v. Wycoff, Seaman & Benedict*, 198 U. S. 118; *Cellular Co. v. Maxton*, 1899 App. Cas. 344, per Lord Halsbury. The foregoing review of the testimony would seem to establish the "secondary meaning" of the name Webster in this case to the point of demonstration. It is wholly without substantial contradiction, and much of defendant's evidence corroborates it. It is worth noting that *defendant did not call one single purchaser of its book* to testify as to what he thought he was buying. The testimony of the deceived purchasers called by complainant must be taken as fairly representing the attitude of the ordinary and average purchaser, as indeed it is.

Defendant's negative case on the question of secondary meaning consists of the following positions, viz.:

- (1) A claim that the public generally do not know the name of the publisher of the Webster's Dictionary;
- (2) A denial that complainant and its predecessors were the "original publishers," or that they were ever or for any period the exclusive "publishers" of Webster dictionaries.
- (3) The existence in recent years of other dictionaries bearing the name Webster's.

Defendant's evidence on this subject will be briefly summarized, and the answer to it indicated.

(1) *Knowledge of name of publisher.*

Substantially the whole of defendant's testimony upon the question of "secondary meaning" is directed to establishing the proposition that the ordinary purchaser does not know the name of the publishers of Webster's Dictionary. This was admitted and proved by complainant, who asserts and relies upon it. It supports complainant's case by demonstrating that the title is deceptive notwithstanding the publisher's name in the imprint. Defendant, and its witness, argue from this fact that "Webster" cannot have a secondary meaning and does not indicate the Merriam's books. This is a common fallacy, often refuted by the Courts,¹ and conclusively disproved by the testimony in this case.

It is, indeed, the typical situation in all trade infringement cases. The ordinary and average purchaser buys by the name or brand, and when he asks for "B. V. D." underwear, or a "Carolina" Cigar, or an "Arrow" collar, or a "Worcester," or other named dictionary, it is a particular make of article he desires, coming from a common and original source, and if he is given a substitute coming from a different source he is deceived, although he may neither know nor care who actually makes the brand of goods or prints the book which he prefers. In *Birmingham Vinegar Brewery Co. v. Powell*, [1896] 2 Ch. 54, 68; 14 R. P. C. 720, [1897] A. C. 710, 716, in answer to the argument that the pub-

¹*Shaver v. Heller* (C. C. A.), 108 Fed. 821, 824; *Bates v. Bates*, 172 Fed. 892, 897; *Faulder v. O. & G. Rushton*, 20 Rep. Pat. Cas. 477, 485; *Powell v. Birmingham Vinegar Brewery*, [1896] 2 Ch. 54, 68, on appeal [1897] App. Cas. 710, 716; *Wotherspoon v. Currie*, L. R. 5 H. L. 508, 27 L. T. N. S. 393; *Standard, etc. Mfg. Co. v. Standard Ideal Co.*, 37 Quebec Super. Ct. 33.

lic had not identified "Yorkshire Relish," with either the complainant, or his establishment, Lord Chancellor Halsbury said, ([1897] App. Cas. p. 713):

"It may be true that *the customer does not know or care who the manufacturer is*, but it is a particular manufacture that he desires. He wants 'Yorkshire Relish' to which he has been accustomed, and which, it is not denied, has been made exclusively by the plaintiff for a great number of years. 'This thing which is put into the hands of the intended customer is not 'Yorkshire Relish' in that sense. It is not the original manufacture. It is not made by the person who invented it. Under these circumstances it is a fraud upon the person who purchases to give him the one thing in place of the other."

And Lord Herschell further remarked (p. 715):

"I think that *the fallacy of the appellants' argument rests on this*—that it is assumed that one trader cannot be passing off his goods as the manufacture of another unless it be shown that the persons purchasing the goods know of the manufacturer by name, and have in their mind when they purchase the goods that they are made by a particular individual. It seems to me that one man may quite well pass off his goods as the goods of another if he passes them off to people who will accept them as the manufacture of another, though they do not know that other by name at all. In the present case, it seems to me that 'Yorkshire Relish' meant the manufacture of a particular person. I do not mean that in the minds of the public the name of the manufacturer was identified, but that it means a particular manufacturer, and that when a person sold 'Yorkshire Relish,' as the appellants did, by selling it as 'Yorkshire Relish,' and calling it 'Yorkshire Relish,' they represented to the public that

it was that manufacture which was known as and by the name of 'Yorkshire Relish.'"

In the Court of Appeals, whose decision was affirmed by the House of Lords, *supra*, Lindley, L. J., said:

"Persons may be misled and may mistake one class of goods for another, although they do not know the names of the makers of either. A person whose name is not known, but whose mark is imitated, is just as much injured in his trade as if his name were known, as well as his mark. His mark as used by him has given a reputation to his goods. His trade depends on such reputation. His mark sells his goods. A rival who imitates his mark can hardly help deceiving buyers and injuring him; and for such injury, if proved, he can obtain redress."

In *Wotherspoon v. Currie*, L. R., 5 H. L. 508, 27 L. T. (N. S.) 393, Lord Chancellor Hatherly said:

"It may very well be that hundreds of people like 'Glenfield Starch' and order it because they think that it is the best starch that they ever used, without ever having heard of the name of Mr. Wotherspoon, and without knowing him at all. They say, I want the thing that bears that name, the thing made in a particular way, made by the manufacturer who makes it in that way, and there being only one manufacturer who does make it in that way, I want the article made by that manufacturer."

In *Bates Mfg. Co. v. Bates Numbering Mach. Co.*, 172 Fed. 892, 897, the Court said:

"A trade name is usually more striking than the name of its user. It is likely to give more information about the product and calculated to make a more lasting impression on the mind than a mere trade-mark. *Where such trade-*

*name of the product is dissimilar to that of the manufacturer, it is likely to be remembered, even though the name of the person entitled thereto is overlooked or forgotten. Faulder & Co., Ltd. v. O. & G. Rushton, Ltd., 20 R. P. C. 477.*¹ In such a case such trade-name obtains a secondary meaning, even though in its primary sense it is not subject to the exclusive ownership of the trader."

In *Shaver v. Heller* (C. C. A.), 108 Fed. 821, 824, where the word "American" was held to have a "secondary meaning" as applied to wash bluing, Judge Sanborn said:

"The excellence of the article and the introduction which the appellee gave it . . . established the trade in it, and gave that trade its value. Purchasers in the trade and the public came to know, to demand and to buy the appellee's manufacture by this brand. One does not lose the good will of his trade in an article of his manufacture by placing upon it the names of his customers who are engaged in selling it, nor by the fact that the consumers know only the name and excellence of the article, and neither know nor care who makes it."

¹In *Faulder & Co., Ltd. v. O. and G. Rushton, Ltd.*, 20 Rep. Pat. Cas. 477 (the case above referred to), Vice Chancellor Hall said (485): "I am still on the point, whether or not the Plaintiffs' manufacture is known as 'Silverpan,' or conversely whether 'Silverpan' conveys the idea of *Faulders*, whether persons knew *Faulders*' name or not. If a man is accustomed to buy a certain brand which has become a catchword, very often he forgets the name of the maker. He might remember jam that he bought, which was undoubtedly *Faulder & Co.*'s jam, and, wishing to get the same jam again, in asking for 'Silverpan' he would buy it in the expectation of getting the same brand, that is *Faulders*' brand; therefore, I am not at all sure it was an absolute necessity that a person asking for 'Silverpan,' should have in his mind also the name of *Faulder*."

Persons who do know who is the proprietor of the genuine goods, expect to get his wares, and those who do not know the proprietor's name expect to get goods from the same source as goods they previously had known. In either case, there would be deception. *Standard Sanitary Mfg. Co. v. Standard Ideal Co.*, 37 Quebec Super. Ct. 33.

The foregoing quotations from the decisions destroy defendant's whole theory of "secondary meaning," and demonstrate the irrelevancy of its testimony offered in support of such erroneous theory.

The ordinary purchasers who have been called and examined in this case, and who have shown how they were actually deceived by defendant's book, illustrate how accurately the courts in the above quotations have apprehended the psychology of the ordinary and average purchaser. Their specific testimony also corroborates other general testimony of sales-agents, and others.¹

The attitude of the public is well summed up by complainant's witness Lutz, as follows:

"I believed that Webster Dictionary was published by one company, the name of which I did not know. . . . I believed it was a book which was published by the company which, I assumed publishes all Webster dictionaries." (*Rec. vol. I*, p. 298, fols. 1189, 1192.)

A number of salesmen from department stores and book shops testified on behalf of defendant. The substance of their testimony was that the average purchaser does not know the name of the publisher of any Webster Dictionary, or for that matter of books in general, and from this they drew the conclusion and

¹See *Abstract of Testimony* in Appendix, *post*, pp. 41 *et seq.*

expressed the opinion that the name "Webster's Dictionary" does not indicate the books of any particular publisher.

These opinions and conclusions have already been sufficiently answered both upon the law and the facts. It appears that these book-sellers all dealt directly with the publishers in procuring their stocks and were especially familiar with the names of such publishers. It also appears that they invariably carried in stock both the genuine Webster's dictionaries of complainant and other so-called "Webster" dictionaries of other publishers. Their testimony that they personally do not know what book is intended when a customer comes in and asks for either a large or small Webster's dictionary amounts to nothing. It does not show that such a customer did not have complainant's authoritative books in mind. They all testified that customers do come in and ask for a Webster's dictionary. It is a fair presumption that such customers desire the Webster's Dictionary of which they had previously known and which had a good reputation in the minds of the general public. That means complainant's book.

These witnesses of defendant described what ordinarily takes place in the course of a retail sale. They testified that a customer would come in and ask, as the case might be, for a large or small Webster's Dictionary. They would then show him a stock of books consisting of both genuine Webster's dictionaries of the complainant and various so-called Webster's dictionaries of other publishers and allow him to select the one which in size and price seemed most nearly to meet his requirements. No explanation of the difference between the established authoritative Webster's dictionaries and the other kind was ever given unless

specifically asked for by the customer. As such customer usually did not know that there was any such difference, an explanation was seldom asked for and seldom given. In other words, a customer coming in to buy a Webster's Dictionary because of the reputation and good will of complainant's books of that name was allowed to deceive himself. Showing him a stock of various books, all marked "Webster's Dictionary," was a representation that all were equally genuine and came from a common source. This is the usual way in which the fraudulent Webster dictionaries are worked off upon the public.¹

One of defendant's witnesses unexpectedly corroborated complainant's case as follows:

"Q. 13. Among those dictionaries were there Webster's dictionaries? A. Yes, sir, *both the original and reprints.* . . . x-Q. 45. You stated that you handled both original and reprint Webster's dictionaries. What book did you mean by the term 'original'? A. *That is a book published by the Merriam Company.* x-Q. 46. At that time? A. Yes. x-Q. 47. You did not mean by that term one of the early obsolete editions of Webster's dictionaries? A. No. x-Q. 48. Do you remember the full specific name as 'Webster's International Dictionary' or something of that sort? A. Webster's International. x-Q. 49. That was the book you referred to by the term 'original'? A. Yes. . . . x-Q. 64. The dictionaries of the American Book Company I presume you know are dictionaries published by the Merriams? A. *They are the*

¹*Eckle, Rec. vol. II, fols. 5648-5655; McKnight, Rec. vol. II, fols. 5708-5712; Doran, Rec. vol. II, fols. 4802-4809; Pfanstiehl, Rec. vol. II, fols. 4079-4082; Hesslein, Rec. vol. II, fols. 4042-4043; Sherwood, Rec. vol. II, fols. 4870-4881.*

Webster books, yes." (McKnight, *Rec. vol II*, pp. 1421, 1425, 1427, fols. 5683, 5699, 5706.)

This witness plainly understands that "Webster's" dictionaries are the current publications of the Merriam Company. He used the term "Webster" to distinguish such books from all others. He also knows the difference between genuine and bogus Webster's dictionaries, for he testified:

"If they want a cheap book you can show them some of these reprints; if they want a *genuine book*, you show them *the standard books*.

Q. 24. Like Funk & Wagnalls? A. Like Funk & Wagnalls. Q. And Lippincott's Worcester? A. Yes." (McKnight, *Rec. vol. II*, p. 1422, fol. 5687.)

"x-Q. 54. . . . If he wanted a genuine Webster's Dictionary, what would you show him? A. Webster's International." [i. e., Merriam's book.] (McKnight, *Rec. vol. II*, p. 1426, fol. 5703.)

A Mr. Sherwood testified for defendant that the public do not distinguish dictionaries by the names of their publishers, but that *the only way to distinguish dictionaries is BY THEIR TITLES*. (*Rec. vol. II*, pp. 1211, 1212, fols. 4841, 4847.) This is precisely complainant's contention, and it is defendant's infringing title which causes all the deception.

Another witness for the defendant testified that the average customer cares nothing about the publisher of the dictionary he buys, but that he does care about the "words and definitions" and "the literary contents of the book." (McKnight, x-Qs. 81, 82, *Rec. vol. II*, p. 1428, fol. 5712.) Another said that *the title applies to the contents* rather than the publisher of the book. (*Eckle, Rec. vol. II*, p. 1414, fol. 5656.) This is undoubtedly true, and as already shown, purchasers rely

upon the title as a means of getting the literary contents, words and definitions, which they desire, the title being regarded as a guarantee of the excellence of the contents. When they are given a re-named book of different contents than that of the authoritative Webster's dictionaries they and complainant are both defrauded.

These witnesses also testified that purchasers expect an up-to-date book, and frequently ask whether the book offered them is up to date. (*Rec. vol. II*, fol. 4839.) This shows that purchasers do know something of a series of editions of Webster's Dictionary, and indeed one of defendant's witnesses specifically so testified. (*McKnight, Rec. vol. II*, fol. 5695.) This corroborates like direct evidence upon the part of complainant.

Defendant also introduced in evidence a large amount of incompetent hearsay testimony consisting of answers alleged to have been made by various persons to a list of six questions¹ propounded to them out of court, after issue was joined, by defendant's agents for the purpose of making evidence for defendant in this case.² Objections were duly taken, and motions to

¹These questions are as follows: "1. Do you know who is the publisher or who are the publishers of 'Webster's Dictionary'? 2. When you hear or see the name 'Webster' on a dictionary does it indicate to you a dictionary gotten out by any particular publisher or at any particular place? 3. Do you know of any city or cities where any 'Webster's' dictionaries are published? 4. Do you know of any series of succeeding rewritings of 'Webster's' dictionary gotten out by any one publisher? 5. Who do you think wrote the definitions and fixed the spelling of the words to be found in the 'Webster's' dictionaries you have known about? 6. When do you think those definitions were written and that spelling fixed?" The alleged answers to these questions are printed in the *Rec. vol. II*, fols. 4105, 4932, 5232, 5821. Substantially all answers were in the negative.

²*Rec. vol. II, Skeoch*, fols. 4913 *et seq.*; *Shultz*, fol. 1297 *et seq.*; *Eckle*, fol. 5609; *Gray*, fol. 5726; *Rankin*, fol. 4994 *et seq.*

strike out duly made, and renewed at final hearing,¹ where the court ruled that the testimony was incompetent, and would be disregarded, but that it could not be stricken from the record. This evidence, if accepted, shows merely that the general public do not know the name or location of the actual publisher of the Webster dictionaries, and hence confirms the importance of the trade significance or secondary meaning of the name "Webster's Dictionary."

Naturally the man in the street does not accurately know the history and development of Webster's Dictionary. He does know that there is an existing authentic genuine Webster's Dictionary of great reputation. Complainant publishes it. That is the work he intends when he refers to, or gives an order for, a Webster's Dictionary. These unofficial *ex parte* examiners into the state of the public mind admit that among all the people interrogated *they did not find one who had not previously known of Webster's Dictionary* (*Rec. vol. II, Skeoch*, fol. 4943; *Gray*, fol. 5758; *Shultz*, fol. 5560).

Some said they had known Webster's Dictionary since their school days (*Gray, Rec. vol. II*, fol. 5762, x-Q. 60).

Some of the persons questioned stated that they had used Webster's Dictionary, and had copies of it on their desks, which they wished to refer to in answering questions (*Rec. vol. II, Schultz*, fol. 5563).

Others stated that in their opinion Webster's Dictionary was a good dictionary (*Gray, Rec. vol. II*, fol. 5760, x-Q. 54).

Obviously if these interrogated persons had been

¹*Rec. vol. II*, fols. 5611, 5629, 5751, 5230, 5552.

called as witnesses, and *fully* examined, the list of instances of actual deception would have been multiplied many times over. The negative answers given to the selected questions is in no way inconsistent with a secondary meaning in the name Webster.

(2) *Denial of original and exclusive publication and use is specious and untrue.*

The main defence under this branch of the case consists of a denial that complainant and its predecessors in title were the original "publishers" of Webster's dictionaries, or that they were, at any time, the exclusive "publishers" of such dictionaries, and the truth of Judge Colt's finding that from 1847 to 1889 the Merriams were the exclusive "publishers" of dictionaries under the name of "Webster" was challenged. These contentions of defendant were based solely upon the books, contracts and assignments put in evidence by complainant.

Judge Colt found, in the *Ogilvie* case,¹ and his finding was affirmed by the Circuit Court of Appeals for the First Circuit,² and was followed with approval by the Circuit Court of Appeals for the Sixth Circuit,³ as follows:

"It further appears from the evidence that from 1847 to 1889 the Merriams were the sole publishers of Webster's dictionaries."

Judge Hand, in the opinion below, said:

"The record must have been quite different in that case, for Judge Colt could say that no one but the complainant published any Web-

¹*Merriam v. Ogilvie*, 149 Fed. 858.

²*Merriam v. Ogilvie*, 159 Fed. 638.

³*Merriam v. Saalfeld*, 190 Fed. 197, and on rehearing, 198 Fed. 369.

ster dictionaries between 1847 and 1889, a fact abundantly disproved in the case at bar" (*Rec. vol. III*, p. 2069, fol. 8273).

The learned trial Court was grossly misled into making the above statement, and counsel for appellee will be derelict in their duty to the Court if they allow it to go uncorrected in this Court. As the same counsel appeared for defendants in the two cases, they know that the record on this point was not different, *but was identical*. The evidence in question consisted of (1) the title pages, copyright notices, and inscriptions upon the covers of the Webster dictionaries from 1806 to 1889; (2) various early contracts and assignments, under which complainant claims title, and (3) the copyright certificates of the Webster series of dictionaries. All of this evidence was offered *by complainant* in this case.¹ All of this evidence was offered *by this complainant* in the case before Judge Colt, as appears from the transcript of the record in that case now on file in this court.² The dictionaries produced in this case were the identical books produced in that case. The contracts, assignments, and copyright certificates offered in this case, were in the form of *printed copies actually cut from the record of the case before Judge Colt*. In view of these facts, the lower court's suggestion that the record before Judge Colt must have been "quite different" is untenable.

The facts as to the original and exclusive use of the name Webster to indicate the origin or ownership

¹*Rec. vol. I*, pp. 214, 215. *Exhibits printed, Rec. vol. I*, pp. 671-812.

²Transcript filed April 18, 1908, with petition for writ of *certiorari* in case of *G. & C. Merriam Co. v. Ogilvie*, No. 719, Oct. Term, 1907.

of dictionaries are all shown by documentary evidence, and hence are not open to doubt or dispute. Beginning in 1806, Noah Webster and his estate prepared, published, copyrighted, and continuously owned every "Webster" dictionary until the series was conveyed to G. & C. Merriam, complainant's predecessor, by the early contracts and assignments. From that time until 1889, the Merriams prepared, published, copyrighted and continuously owned every "Webster" dictionary published in this country.¹

The sole function of trade-marks and trade names is to indicate origin or ownership of the goods. From 1806 to 1889, every dictionary bearing the name Webster came from the same source, and had the same ownership. This was always either complainant itself, or one of its predecessors in title, going back without break to Noah Webster.² The name Webster was used *exclusively* in this manner by complainant and its predecessors during all this long period. Defendant is challenged to point out a reference in the record to a single Webster dictionary of this period of a different origin or ownership. There are none such in evidence.

Instead of denying such exclusive origin and ownership of all "Webster" dictionaries (an undeniable fact), defendant, by a mere play upon the word

¹See "Chronological Statement of the Publication of Webster Dictionaries", in Appendix, *post*, pp. 1 *et seq.* The possibility of insignificant and unknown piracies is, of course, not excluded. But there is only the very vaguest testimony of any such, and any such would be immaterial on the question of secondary meaning.

²See *title pages, Copyright notices, and certificates of Webster series, Rec. vol. I*, pp. 671-779. "Early Contracts and Assignments," *Rec. vol. I*, pp. 783-812. And see *Abstract of Testimony*, in Appendix, *post*, pp. 1 *et seq.*

"publisher," asserts that complainant is not the "original publisher" of Webster dictionaries, and not the successor of the original "publisher." This is based solely on the fact that Noah Webster published his first dictionary, that of 1806, by contract with "Hudson & Goodwin, Book-Sellers, and Increase Cooke & Co., Book-Sellers," as appears from the imprint upon the title page.¹

It is absurd, of course, to assert, as defendant does, that Webster never "published" a book, and that he was not the original "publisher" of his own dictionaries, simply because he was not a printer or book-seller. He was the original publisher of his own works in every legal and ordinary sense of the term,² and complainant is his direct successor.

Relying upon a like play upon the word "publisher," defendant asserts that nine concerns "published" Webster dictionaries prior to 1847,³ as shown by the publishers' imprint, upon the title pages of the books published during this period.⁴ But the indisputable fact is that Webster was the author and proprietor of all of these dictionaries and the owner of the

¹See title page, *Rec. vol. I*, p. 671.

²"PUBLISH. . . . 4. To cause to be printed and offered for sale; issue from the press; put in circulation; as, to *publish* a book" etc. "PUBLISHER, one who publishes." *Century Dictionary*.

"PUBLISH. . . . 3. To bring before the public, as for sale or distribution; esp. a To print, or cause to be printed, and to issue from the press, either for sale or general distribution, as a book," etc. "PUBLISHER. One who publishes; esp. one who issues, or causes to be issued, from the press," etc. *Webster's New International Dictionary*.

³Hudson & Goodwin; J. & D. West; S. Converse; N. & J. White; White, Gallaher and White; F. J. Huntington & Co.; Huntington & Savage and J. S. & C. Adams.

⁴See "Title Pages, Cover Inscriptions and Copyright Notices of Webster Series", *Rec. vol. I*, pp. 671-719.

copyrights under which they were published.¹ He remained at all times their sole proprietor and the responsible source of their literary contents. The name designated *his* series. Not one of these "publishers" compiled, copyrighted, or published upon his own account independently a Webster dictionary. All merely printed and sold specific books under contract with Webster as proprietor. Their use of the name Webster upon the books so published was just like that of every retailer of trade-mark goods. In a word, it was a licensed use of the name *upon genuine goods*, procured from the original and sole proprietor. The name during this period indicated origin and ownership in Webster exclusively. He reaped the benefit of the good-will acquired by the name, and it is immaterial how many selling agencies he employed.

Defendant further asserted below that from 1847 to 1889 fifteen other named publishers² continuously published Webster dictionaries under that title *in competition with complainant*, and that consequently the name Webster could not have acquired any secondary meaning indicating only the Merriam publications. Such statement is wholly untrue, and there is nothing in the record to justify it. It was this untrue statement that misled Judge Hand. It is conclusively shown by the record³ that all of these so-called

¹See "*Copyright Certificates of Webster's Series*", *Rec. vol. I*, pp. 721-781.

²Harper & Bros.; White & Sheffield; J. S. & C. Adams; Huntington & Co.; F. J. Huntington; Huntington & Savage; Mason Bros.; J. B. Lippincott Co.; Ivison, Blakeman, Taylor & Co.; Ivison, Finney, Blakeman Co.; American Book Company; J. Duffy's Sons & Co.; Ward, Locke & Co.; World Publishing Co. and Hurst & Co.

³See "*Chronological Statement of the Publication of Webster Dictionaries*," in Appendix, *post*, pp. 1 *et seq.*

"publishers" during this period, except the last four, as to whom there was but the vaguest secondary evidence of any publication,¹ were mere licensees of the Merriams, selling books which the Merriams had compiled, copyrighted and owned, and paying the Merriams a royalty therefor.² Certainly no rights in the name "Webster" were lost or impaired by any such licensed use.³

Thus defendant stated below that the firm of Ivison, Blakeman, Taylor & Co., and its corporate successor, American Book Company, had sold over 3,500,000 copies of Webster's school dictionaries *in competition with complainant*, and this statement may be repeated. It is untrue, and unjustified. The uncontroverted facts are that complainant prepared the literary contents of these books, provided the plates from which they were printed, copyrighted and owned them, and caused them to be printed and sold by the Ivison firm and its successor, the American Book Company, under a contract to account to the complainant

¹These are: *World Publishing Co.*; *J. Duffy's Sons & Co.*; *Ward, Locke & Co.*, and *Hurst & Co.*; See *Abstract of the Testimony* in Appendix, *post*, pp. 21-24.

²See *Abstract of the Testimony* in Appendix, *post*, pp. 8-21.

³A similar contention was rejected by Judge Lacombe in *N. Y. Herald v. Star Co.*, 146 Fed. 204; *aff'd* 146 Fed. 1023, ("Buster Brown" case) where it was said: "It appears that certain other newspapers have used the words as a title for comic sections in their Sunday editions, but in every instance this was with the consent of complainant and upon paying it for the privilege."

In *Shaver v. Heller*, 108 Fed. 821, 824, the Circuit Court of Appeals for the Eighth Circuit made a similar decision, saying: "One does not lose the good will of his trade in an article of his manufacture by placing upon it the names of his customers who are engaged in selling it, nor by the fact that the consumers know only the name and excellence of the article, and neither know nor care who makes it."

and pay it a royalty on every copy sold.¹ Upon no conceivable theory can such licensees, selling complainant's books, be termed independent "competitors".

Defendant further argued that Harper & Bros. and Lippincott & Co. published Webster dictionaries during this entire period. No one from Harper's or Lippincott's was called as a witness to prove this fact. There was no proof whatever of such publication or sale. Defendant simply assumed it because the names of these publishers appeared in the imprint of certain early editions. The book which defendant asserted Harper and Lippincott published during all this time was the "Octavo Abridgment," which was compiled by Webster and assigned to the Merriams in 1858². This book had previously been published successively by Harper, White & Sheffield, and Lippincott under a Webster license, but after the assignment in 1858 it was published only under a Merriam license. The Merriams published and copyrighted a new edition of it in 1860. The other books claimed to have been published by Lippincott were all Merriam books, published and sold under a Merriam license.³

The defendant also asserted that J. S. & C. Adams, whose names appear in the imprint of Webster's Unabridged Dictionary of 1840, continued to publish this book during the period in question, namely, 1847-1889. No copy of it was produced, or testified to. The copyright and unsold remainder of this edition was sold to

¹*Washburn, Rec. vol. I, fols. 532-533; 884-886; McKnight, Rec. vol. II, p. 1427, fol. 5706.*

²*See Lippincott Contract, Rec. vol. I, p. 795. See Exhibits, Webster's Dictionary, "Octavo Abridgment," editions of 1841, and 1860.*

³*See Abstract of the Testimony in Appendix, post, pp. 13-16.*

the Merriams in 1843, and in 1847 the Merriams published and copyrighted in their own names a new edition of it. Moreover, Adams was originally and always a mere licensee of the proprietor, Noah Webster, to whom G. & C. Merriam directly succeeded.¹

Defendant also contended that the several Huntington firms published Webster dictionaries as competitors of the Merriams, notwithstanding the fact that their license contracts appear in the record and were assigned to the Merriams with the consent of the Webster estate in 1854.² There have been, and still are, licensees distributing, under contract with complainant, the complainant's Webster dictionaries, but complainant and its predecessors were the sole proprietors and the grantors of the licenses. Not until after 1889 did any infringing competitive publications come into the market.

As to the remaining four alleged competitive publishers of Webster dictionaries, no copy of their alleged books could be produced, and nothing is known of their nature or contents. The record shows that the dictionaries of two of them, J. Duffy's Sons & Co. and Ward, Locke & Co., were foreign publications, and no appreciable circulation was shown in this country.³ The book of Hurst & Co. did not bear the name "Webster" at all during this period, but that name was added at a later date to make it sell.⁴ The World Publishing Co. was an unknown and insignificant in-

¹*Rec. vol. I*, pp. 783-794. See *Abstract of Testimony*, *post*, p. 7.

²See "Early Contracts and Assignments", *Rec. vol. I*, pp. 783-812.

³See *Abstract of the Testimony*, pp. 21-24, *Rec. vol. III*, fols. 7237, 4772, 4773, 4794-9.

⁴See *Abstract of the Testimony*, *post*, pp. 23, 24. *Rec. vol. I*, pp. 666, 667; *vol. III*, 1817, 1819.

fringer at most and has disappeared from public knowledge.¹

Obviously Judge Colt was right in finding that complainant was the sole "publisher" of Webster dictionaries down to 1889. But whatever construction may be put on the word "publisher," it is indisputable that complainant (with its predecessors) was the sole proprietor and source of such dictionaries, which is the only material fact. The name Webster has always indicated books of that origin and ownership.

(3) *Existence of other infringing dictionaries.*

The existence in the market for a considerable period of other infringing "Webster" dictionaries was urged by the defendant as a reason why the name "Webster" does not primarily indicate complainant's books. A number of this class of dictionaries were offered in evidence by defendant as exhibits. It appears from the evidence on both sides that, with the exception of the large Ogilvie dictionary, which has been twice enjoined, these other so-called Webster dictionaries are either photographic reprints of the obsolete 1847 edition, or are small books of no literary importance or reputation. In fact many of them are the same book masquerading under different names, and of the same fraudulent character as defendant's book.² Many of them have been enjoined in reported

¹See *Abstract of the Testimony*, p. 24. *Rec. vol. II*, p. 1298, fols. 5190-5192; *vol. II*, p. 1393, 5569-5574.

²*Rec. vol. III*, p. 1833, fols. 7331-7346. See also the books themselves offered as Exhibits, and Complainant's corresponding Dictionary Exhibits, showing the origin of these books. See *Notice Offering Dictionary Exhibits Pursuant to Stipulation*, *Rec. vol. I*, p. 664, fols. 2656-2674. For full statement of the evidence on this subject, see *Abstract of Testimony*, *post*, pp. 30-40.

and unreported cases. It was shown that none of these so-called "Webster" dictionaries have attained any reputation, authority, or individuality of their own, and particularly that they are not the books which have the reputation and authority invoked by the term "Webster's Dictionary."¹ No contradiction of this was attempted.

During the entire period of these publications, complainant litigated its rights against various infringements, and invariably obtained relief. If these other publications conformed to the restrictions imposed by the courts, and adequately distinguished, they could not impair, but on the contrary, would emphasize the trade significance of the name Webster. If they did not distinguish, but were mere piracies successfully passing themselves off as the original and genuine "Webster's" dictionary, they also could not impair the trade meaning of that name. Only by establishing a distinctive identity of their own, as a recognized variety of the "Webster's" dictionaries, could they affect the meaning of that term in the public mind.

The evidence in the case at bar overwhelmingly establishes that at the present time it is the complainant's dictionaries and not any of these infringements which are indicated in the public mind by the name "Webster's Dictionary" and which alone have acquired the high repute and marketability which have tempted so many piracies. The evidence already referred to, showing that the name Webster has acquired, and now possesses, a secondary meaning; that it indicates the

¹*Rec. vol. 1: Clarke*, p. 490, fol. 1960; *Funk*, p. 364, fols. 1454-1457; *Putman*, p. 361, fol. 1561; *Wadlin*, p. 467, fols. 1868, 1876; *Van Dyck*, p. 333, fols. 1332-1337; *Draper*, p. 500, fols. 1999-2002; *Martin*, p. 458, fol. 1829; *Mead*, p. 475, fols. 1897-1898.

dictionaries of the Merriams, and that actual deception of purchasers results from an untruthful use of that name in connection with different dictionaries, is conclusive proof that however great or numerous the infringements upon the Merriam's rights in that name may have been, they have not yet been sufficient to deprive that name of its distinctiveness, or to prevent an untruthful use from being deceptive. This is *the test* of the right to relief. So long as the use by others of the name Webster naturally and probably tends to deceive the public, and to lead buyers to accept such other dictionaries as and for the Merriam dictionaries, the Merriams have not lost their right to protection.¹

In the *Ogilvie* case, in the First Circuit, the existence of numerous infringing Webster dictionaries was also before the court, but Judge Colt held, with the approval of the Circuit Court of Appeals, that—

"Notwithstanding this circumstance, it is shown by a preponderance of evidence that the name 'Webster' still indicates to the public the dictionaries published and sold by the Merriam Company." *Ogilvie v. Merriam*, 149 Fed. 858, 860, affirmed 159 Fed. 638.

In the *Saalfield* case, in the Sixth Circuit, the Circuit Court of Appeals, with these infringing dictionaries before it, said:—

"This finding may well rest upon *sufficiently* exclusive use, with public acquiescence, from

¹"One test by which to determine whether a word which was originally a trade-mark has become *publici juris* is whether the use of it by persons other than the original owner, is still calculated to mislead the public, and to induce them to buy goods not made by the original owner, upon the supposition that they are his goods." *Rathjen's Am. Comp. Co. v. Hotzappel Comp. Co.*, (C. C. A.) 101 Fed. 257, 263. See also *Ford v. Foster*, L. R. 7 Ch. 611; *Tellow v. Tappan*, 85 Fed. 774, 775.

1889, when the copyright expired, till 1904 when Ogilvie published." *Merriam v. Saalfeld*, 198 Fed. 369, 375.

That finding is still true. No change of meaning has been shown. Piracy by one person does not authorize piracy by another.¹ Defendant has proved merely the existence of other infringements; but complainant has shown that notwithstanding this fact, the name "Webster" is still distinctive, and still indicates its book, and that defendant's use of it deceives the public.

III.

DEFENDANT'S BOOK IS A REPRINT OF THE "BRITISH EMPIRE DICTIONARY," AN ENGLISH WORK NOT EVEN "BASED" ON ANY EDITION OF WEBSTER'S DICTIONARY; IT IS NOT A GENUINE WEBSTER'S DICTIONARY IN ANY SENSE OF THE TERM.

If defendant's book is in truth a Webster's Dictionary, doubtless it may be called so, with an explanation to prevent deception. But if defendant's book is not a Webster's Dictionary, defendant will not be permitted to misrepresent it, with the purpose and effect of passing it off as and for complainant's Webster dictionaries.

The inquiry here, therefore, is whether or not defendant's book is, as a matter of fact, in any fair and reasonable sense of the term a Webster's Dictionary.

¹*Cocks v. Chandlers*, L. R. 11 Eq. 446, 450. "It is no answer to his complaint against any particular person who has so used it [i. e., labels and dress of goods] to say that such person is not the only one who has done so, for a trespasser cannot justify upon the ground that others have committed like trespasses." *Actiengesellschaft, etc. v. Amberg* (C. C. A.), 109 Fed. 151.

This is purely a question of fact to be determined on the evidence, and involves a determination of the identity of the books known today as Webster's Dictionary. In view of the prior adjudications and the demonstrated "secondary meaning" of the name "Webster," there seems to be no room for doubt.

Burden of proof is on defendant to justify.

The burden of proving facts showing that defendant's book is a Webster's Dictionary, and entitled to bear that name, rests upon the defendant. As this court has said:—

"When the defendant has to justify using the plaintiff's trade-name, *the burden is on him*. Finally as the case presents what is a fraud on its face, it is more likely that the defendant is a modern advertiser than that he has discovered the hidden formula of the plaintiff's success."¹ *Jacobs v. Beecham*, 221 U. S., 263.

In the *Webster's Dictionary* case against Saalfeld, the Circuit Court of Appeals for the Sixth Circuit, took the same view, saying:

"So it is wrong, in such a case and when this 'secondary meaning' is once established, to start with the premise that defendant is entitled to use the word; *prima facie*, viewed from this point, he is not. The right, for the purpose of such a case, is primarily vested in the complainant." *Merriam Co. v. Saalfeld*, Opinion on Rehearing, July 17, 1912, 198 Fed., 369.

Defendant's answer admits that defendant's book is not a copy or reproduction of any previous genuine

¹See also *Liebig's Extract of Meat Co. v. Liebig's Extract Co.*, (C. C. A.) 180 Fed. 688, 690, where the same rule was declared and applied.

Webster's Dictionary. It pleads as an affirmative defense, however, that its book is "a revision of" the 1847 edition of the book entitled, "An American Dictionary of the English Language by Noah Webster" which, in its day, was known as "Webster's Dictionary," and claims that this alleged fact justifies it in saying that its book is Webster's Dictionary. (*Answer, Rec., vol. II*, pp. 957, 958.) As a matter of law this conclusion is erroneous. The fact alleged is untrue. The *burden of proving this fact is upon defendant.*

Decision below, and comments thereon.

The defendant failed to prove the defense alleged, and the court below so found. The answer alleges:

"Defendant denies that the designating title of said dictionary, 'Webster's New Standard Dictionary,' is false, and alleges the fact to be that said dictionary is a revision of 'Webster's Unabridged Dictionary,' the copyright of which was issued in the year 1847." (*Rec. vol. II*, p. 957.)

The court found:

"The complainant has established beyond any question, in my judgment, that the immediate basis of the Crown Dictionary¹ was the British Empire Dictionary, which has been put in evidence in this case, and which was edited by the Rev. E. D. Price, F. G. S. The proof of this consists in the identity of the literary matter between the two, which is so great as to be substantially identical." (*Rec. vol. III*, p. 2062, fol. 8247. See also "*Red Letter Exhibit*", *Rec. vol. I*, p. 889, *et seq.*)

¹The answer admits that defendant's book is reprinted from the plates of the Crown Dictionary (*Rec. vol. II*, p. 958).

This disproved the defense alleged and attempted to be proved by defendant. But under a manifest misapprehension of the evidence, and upon a theory of literary descent which was twice expressly repudiated by defendant in taking evidence,¹ and which is inconsistent with the fact pleaded, the trial Court assumed that the "British Empire Dictionary" of Price was the "literary descendant" of the "Imperial Dictionary" of John Ogilvie (1883 edition), the first edition of which was published in 1850, and that the latter edition of the Imperial was "on the basis of Webster's English Dictionary."² Then the Court said:

"Certainly Ogilvie could have called the Imperial Dictionary either 'Ogilvie's Webster' or

¹*Rec. vol. III*, pp. 2018, 2019, where the following occurred on objection to a question put by defendant to its witness Rolfe:

"MR. HALE: Objected to . . . and further, because it is not shown that there is any connection between defendant's book and the English Ogilvie's Imperial Dictionary, but on the contrary, defendant's book is alleged to have been based directly upon Webster's Dictionary, and an attempt has been made to show that fact.

"MR. CARROLL: Defendants are not attempting to prove any origin or basis in the Ogilvie Imperial Dictionary, but are simply attempting to ascertain more correctly what this witness means by 'basis.'"

"Re-d. Q. 142. If, for example, the editor of this book in Webster's Illustrated Dictionary had never seen Webster's 1847, but had compiled his book entirely from Ogilvie's Imperial Dictionary, and the result had been as it is in this book, such a large percentage of material identical with Webster, would you say that it was truthfully derived from or based on Webster's dictionary?

"MR. HALE: Objected to as incompetent, irrelevant and immaterial, as incorrectly assuming facts and as calling for a mere guess or conjecture as to a state of facts which is not even claimed to exist.

"MR. CARROLL: Defendants truly do not claim this state of facts to exist, but are merely attempting to find out precisely what the witness understands by the words 'based on' or 'derived from.'"

²*Opinion below, Rec. vol. III*, pp. 2062-3.

the 'Imperial Webster,' or any other kind of 'Webster' that he wished. The successive editions certainly were Webster dictionaries and so were any smaller works, derived from those editions, whether abridgments, condensations, or the like. Nor does it seem to me to matter that the intermediate sources did not go by the name Webster. Here, for example, is a work which comes down by precisely the same kind of line of descent from Webster that the complainant's present abridgments come, each individual in the line being formed from its predecessor by some accretion, some elimination, some amendment, till one reaches the work of Webster himself. When the public uses 'Webster' does it understand that all the intermediate steps shall have been so named? I hardly think so. Rather, it seems to me, it is the fact of its unbroken descent that the word implies." (*Rec. vol. III*, p. 2064.)

This is the theory and reasoning upon which this case was decided. We respectfully submit that it is radically erroneous for the following, among other reasons:

(1) The fact as to public use and understanding of the name Webster in connection with dictionaries must be found upon the evidence, and may not be simply an expression of the judge's individual opinion, as the above seems to be (*Howe Scale Co. v. Wycoff*, 198 U. S. 118). The opinion above expressed is not only without any evidence to support it, but it is contrary to the uncontradicted testimony of all the witnesses upon both sides.¹

(2) Again, and conceding *arguendo* that John Ogilvie, in 1850, could have called his Imperial Dic-

¹See *ante* Point II, pp. 13 *et seq.*, especially pp. 28-31.

tionary "any kind of Webster that he wished," he did not do so. He made a different book. He gave it a distinctive name. It acquired an identity and authority of its own, under its own name, and was never known or recognized as a Webster's Dictionary. An order in the market for "Webster" dictionaries could not have been filled with it,—it would not have been a good delivery. A contract calling for "Imperial" dictionaries could not have been performed by supplying "Webster's" dictionaries. Revised editions of the "Imperial," and abridgments of such revised editions, stand on its reputation and good will,—not on that of Webster's Dictionary. For more than half a century the two works grew steadily apart, during which period complainant was building up the name and reputation of its revised Webster dictionaries and keeping the work abreast of the times, which developed work alone is now recognized by the public under the name "Webster's." At this late date, it is surely wrong in every sense,—moral, legal and literary, to call an offshoot of the Imperial Dictionary a "Webster's Dictionary." Witnesses on both sides so testified (see *ante*, pp. 28-30). If Ogilvie, in 1850, had called his book Ogilvie's Webster, or any other kind of Webster he wished, two distinct varieties or editions of "Webster" dictionaries might have developed *pari passu*. But he did not do so, and only one Webster's Dictionary was developed,—that of complainant.

(3) Defendant's book is not "a work which comes down by precisely the same kind of line of descent from Webster that complainant's present abridgments come." Every book in complainant's line has borne the name, and been known in its time as Webster's Dictionary. Each is the immediate descendant of a

Webster dictionary. Each came from the same source, and had the same continuity of ownership, as all prior Webster dictionaries. Defendant's book has had no continuity of origin, ownership or name. It has changed name and ownership at every step in the line. No predecessor in the line for over sixty years has borne the name, or been known as Webster. "Unbroken descent" can hardly be claimed for defendant's book. Under the theory of the Court below, it would be fair and lawful for the publishers of the well-known "Century" and "Standard" dictionaries to rip off the covers, to tear out the title pages, to re-title each of those works "Webster's Dictionary," and then to sell them in competition with the established Webster's Dictionary, for both works actually have the precise line of descent incorrectly attributed to defendant's book by the court below as the basis of its decision.

(4) The finding of a basis in the English "Imperial Dictionary" was erroneous, and surprised complainant because: (a) such issue was not litigated; (b) defendant expressly disclaimed and repudiated such proposition, whereby complainant was misled, and did not offer evidence in rebuttal of it; and (c) it is inconsistent with the answer, and the whole course of the proofs. The Court considered that there was "adequate *prima facie* proof" of this fact "in the absence of contradiction." (*Rec. vol. III*, p. 2063.) There was no chance to offer contradiction, under the circumstances.

(5) The Court misapprehended the evidence. There is no such evidence in the record as the Court recites as a basis for this finding.

Evidence as to literary origin of defendant's book.

In its *prima facie* proofs, complainant offered no evidence of the literary origin of defendant's book, the answer having admitted that it was a reprint of the "Crown Dictionary," and the burden of proving that this book was a revision of the 1847 edition of Webster's Dictionary, as alleged in the answer, being upon the defendant.

Defendant attempted to prove its allegation, relying for this purpose solely upon the expert opinion evidence of Professor Peck, formerly of Columbia University.¹ He testified that in his opinion, defendant's book was "Websterian" in character, and contained matter which, in his opinion, had been copied or paraphrased from Webster's Unabridged Dictionary, and that, therefore, it was properly called "Webster's Dictionary."² There was no proof of the actual sources of either the Crown, or British Empire Dictionary. There was merely the opinion of Prof. Peck.

In rebuttal, complainant proved, and the Court found,³ that instead of being revised from the 1847 edition of Webster, as alleged, the actual basis of the Crown Dictionary was, "beyond any question," the British Empire Dictionary, with which it was substantially identical.⁴ In further rebuttal, to meet the argument that Peck's opinion evidence equally showed that the British Empire Dictionary was revised from the 1847 edition of Webster, complainant proved that the

¹*Peck, Rec. vol. III, p. 1534 et seq.*

²*Rec. vol. III, pp. 1545-1555.*

³*Opinion below, Rec. vol. III, p. 2062, fol. 8247.*

⁴*Mawson, Rec. vol. I, pp. 506-540. See also "Red Letter Exhibit," Rec. vol. I, pp. 889 et seq.; also the exhibit copies of said dictionaries.*

alleged similarities between the Crown dictionary and the original Webster of 1847, upon which similarities Professor Peck based his opinion, either did not exist at all, or were greatly exaggerated; that such similarities as did exist were non-significant, being necessitated by the common subject matter and equally found in almost all dictionaries, and that much greater and more significant identity existed between defendant's book and several previous British dictionaries, notably Cassell's Dictionary, Chambers' Dictionary, Johnson's Dictionary and the English Imperial Dictionary of John Ogilvie (1883 edition).¹ It was further shown that the matter alleged to have been copied from Webster might equally well have been copied from any one of several dictionaries.² The sole purpose and effect of this evidence was, not to prove the literary sources of defendant's book (for it was not incumbent on complainant to do so), but to show that Peck's opinion that certain definitions were copied or paraphrased from Webster had no foundation or probative force, because they might equally well have been copied or paraphrased from other sources, or even have been independently produced. When Peck's testimony was so rebutted, defendant's case failed, because the burden of proving revision from Webster was on defendant.

In surrebuttal, defendant reiterated its claim of direct revision from Webster; recalled Peck, who gave additional instances of alleged copying and paraphras-

¹*Mawson, Rec. vol. I*, pp. 540-553. See also *Abstract of Testimony* in Appendix. The English Ogilvie's Imperial Dictionary must not be confused with the Webster's Imperial Dictionary enjoined in the Ogilvie suit in the First Circuit, 159 Fed. 638. They are wholly distinct books.

²"Complainant's Parallel Column Exhibit," and *Mawson, Rec. vol. I*, pp. 540-553.

ing,¹ and called Prof. Rolfe, who testified that in his opinion Peck's exhibits were fairly made, and indicated to him that defendant's author "had Webster before him; Webster was his primary source; that is, he worked from Webster" (*Rec. vol. III*, pp. 2005-6); had the book before him in doing the work, and actually saw it (*Rec. vol. III*, p. 1994).

The opinion below expressly rejects the whole of defendant's evidence as to the literary origin of defendant's dictionary.² It found that defendant's author did not see and use Webster, as claimed, and gave to the book an origin and descent which was expressly denied and repudiated by defendant and opposed to the whole theory of its proofs, and which was different from that alleged in the answer. The actual defense was disproved, and the court so found. The decision was rested on a fact neither alleged in the pleadings nor litigated by the parties.

Two additional grave errors, in respect to the testimony, were made by the court in reaching its conclusions as to the literary descent of defendant's dictionary.

(1) Thus the court said:

"The parties in taking testimony have proceeded upon the assumption that the kinship between dictionaries may be ascertained by ex-

¹*Rec. vol. III*, p. 1914 *et seq.* And see *Abstract of Testimony*, in *Appendix*.

²Judge Hand said: "The first question, therefore, which arises is, whether the dictionary in question was based upon Webster's original work in such sense that it is entitled to be known by that name. In the solution of this question I am not disposed to enter into any nice considerations of a literary character, such, for example, as Professor Peck suggests, as to what creates a Webster's dictionary. For it is quite clear that whatever scholars may think, the public generally—and it is the public with whom we are now concerned—mean something else by the words in question." (*Rec. vol. III*, p. 2061.)

amining the verbal identities in the contents" (*Rec. vol. III*, p. 2062).

Complainant's whole case in rebuttal was a strong negation of such proposition, and the actual position taken by complainant below was thus stated in its briefs:

"In compilations such as directories, dictionaries, digests and the like, mere identity of language does not prove copying, because the necessities of the situation, and the existence of common sources, requires and produces similarities and identities. Something additional, in the nature of common errors, etc., must be shown to support the conclusion of copying. The copy-right cases are in point"¹ (Brief in District Court, p. 92; in C. C. A., p. 61).

Almost the whole of complainant's rebuttal testimony is in direct denial of the assumption attributed to complainant by the court. That is its sole purpose.² For example, complainant's witness Mawson testified:

"As is well known to all men engaged in lexicographical work, there is a certain per-

¹*Callaghan v. Myers*, 128 U. S. 617; *List Pub. Co. v. Keller*, 30 Fed. 772; *West Pub. Co. v. Lawyers' Co-Op. Co.* (C. C. A.), 79 Fed. 756. The brief below further contended: "The small amount of similar or identical words common to defendant's book and the 1847 Webster, is not significant of copying or use. There is a necessary and unescapable amount of similarity and identity between all dictionaries due to the subject-matter. Dictionaries are compilations of facts. All dictionaries purport to correctly define the same words. They must, therefore, state the same meanings, and as the English language must be used to do it, necessarily many identical words and phrases, especially stereotyped forms of expressions will be used, even by independent compilers, in stating the same thing. The brevity of dictionary definitions increases the similarity between them. Use of synonyms is a common thing in dictionaries, and the same synonyms must be used in all, and the number of them is limited for any given word" (p. 92).

²*Mawson*, *Rec. vol. I*, pp. 540-554. See also "Complainant's Parallel Coleman Exhibit in Answer to Peck's Exhibit."

centage of identical expression running through all dictionaries. These similarities may be accounted for, first, as unavailability; second, the use of synonyms; third, coincidence; fourth, common sources" (*Rec. vol. I*, p. 545).

And on cross-examination of defendant's experts, complainant corroborated its own witness by bringing out such statements as: All dictionaries have an inherent similarity. "There is a kind of traditional vocabulary you know;" as the definitions must be expressed in the English language, "similar words will be used."¹ "The identity must be in some significant particular, some significant word rather than a common word."² Common errors, oddities and significant words are evidence of copying.³ "Similarity of language is not a reliable test, or even identity of language as to the source of a book."⁴ "Of necessity they have to be similar because they are supposed to embrace definitions of the English words generally."⁵ Complainant's witness expressly stated the purpose of his comparison of various dictionaries, saying:

"My aim was simply to show that without using Webster's Unabridged Dictionary at all, a most considerable portion of defendant's dictionary could be made up" (*Rec. vol. I*, p. 543).

The court below must have misapprehended the purpose and effect of this line of evidence, for it demonstrates that the kinship between two dictionaries cannot be ascertained by merely "examining the verbal identities between them"; that regard must be had to pos-

¹Peck, *Rec. vol. III*, p. 1662.

²Rolfe, *Rec. vol. III*, p. 1995.

³Rolfe, *Rec. vol. III*, pp. 1996-7.

⁴Rolfe, *Rec. vol. III*, p. 2006.

⁵Sherwood, *Rec. vol. II*, p. 1227.

sible common sources, common errors, peculiarities and the like, and to consecutive and continuous identity of language, such as proved defendant's copying of the British Empire Dictionary.¹

(2) Again, the opinion below says:

"The closest in content to the British Empire Dictionary is Ogilvie's Imperial Dictionary of 1883. The similarity of contents extends to 70% of literal identity; that is to say, 70% of the contents of the British Empire Dictionary appears verbatim in the Imperial" (*Rec. vol. III*, pp. 2062-3).

The court accordingly found that defendant's book was the literary descendant of the Imperial. This was expressly and solely based on the testimony of complainant's witness Mawson, which does not support the above finding. The record shows that defendant's expert Peck had marked exhibit copies of defendant's book and Webster's Dictionary purporting to show identities and similarities between them, and upon which he based his opinion that Webster had been used and copied by defendant's author.² Peck marked in his exhibits, as evidence of such use, what he termed "paraphrases," many of which were grossly unfair, and manifestly absurd.³ To show the true fact, complainant prepared a "Parallel Column Exhibit in answer to Peck's Exhibit," in which these same pages, and corresponding portions of numerous other standard dictionaries are compared, and marked for ease of verification.⁴ In this exhibit

¹See *Mawson, Rec. vol. I*, pp. 505-540.

²*Peck, vol. III*, p. 1556 *et seq.* Also "Defendant's Exhibit C, Peck's Identities."

³See cross-examination of *Peck, Rec. vol. III*, pp. 1618 *et seq.* Also see *Abstract of Testimony, in Appendix, post.*

⁴See explanation of this exhibit, *Mawson, Rec. vol. I*, pp. 542-553.

every word common to defendant's book and the various standard dictionaries compared is underscored in ink, even common and widely scattered words. Actual count of such words shows that the proportion of words in defendant's book identical with words in the specified dictionaries is respectively as follows:¹

With British Empire Dictionary.....	98%
With Cassell's and Imperial combined.....	76½%
With Imperial Dictionary (1883 edition)....	70%
With Cassell's Dictionary.....	61%
With Chambers' Dictionary.....	49%
With Johnson's Dictionary.....	49%
With Annandale's Concise Dictionary.....	46%
With Webster's Unabridged Dictionary (1847 edition).....	45%
With Worcester's Dictionary.....	44%
With Stormonth's Dictionary.....	39%
With Nuttall's Dictionary.....	39%
With Student's Standard Dictionary.....	32%
With Concise Oxford Dictionary.....	28%

This table is accurate, and was accepted and acted upon by the court below. It completely destroyed Peck's opinion testimony that defendant's book was revised from Webster because some similarity and some identity exists between their respective definitions of the same words. With equal or greater probability, it might be said to be based on almost any one of the above dictionaries.² It is apparently an independent compilation,

¹Rec. vol. I, pp. 544; 549.

²Mr. Mawson testified: "This 45% in Webster's is really more than the exhibit actually warrants. I mean that the terms in Webster's are so much scattered, and as a rule are not connected, whereas in other dictionaries, but most particularly in Cassell's the language is closer and with fewer gaps. Moreover, this 45% of identical words which are common to both Web-

with as much originality as most mere compilations of facts may have.¹

The court below while finding against defendant's contention of revision from Webster, held that this table showed that defendant's book was taken from the Imperial Dictionary because of the 70 per cent. of identity between them.² This was erroneous because it disregards the other facts shown by the same table. At the utmost, the table shows only fifteen and one-half ($15\frac{1}{2}\%$) per cent. taken from the Imperial, even upon the assumption that every word in defendant's dictionary common to any other dictionary was copied from some source. Thus the table shows that 61 per cent. of these words could have been taken from Cassell's alone; and that when the Imperial is added to Cassell's, the percentage of defendant's words found in the two combined is increased only by fifteen and one-half ($15\frac{1}{2}\%$) per cent., *i. e.*, to $76\frac{1}{2}\%$. What proof is there that more was taken? Of course, it *may* have been the other way

ster's Unabridged and defendant's dictionary does not mean that outside the other dictionaries I found 45% of matter which could be found in Webster's, but the whole of the matter referred to which is included in that 45% could be found in the other dictionaries specified" (*Rec. vol. I*, p. 544, fols. 2174, 2175).

"In some instances, to make up the sense, they were found a line or two apart. It would have been possible to have taken a copy of the *New York Sun* and marked up some of the columns and say these are the words which have been found, so wide apart and so different from the Webster's Dictionary were the words in defendant's dictionary" (*Rec. vol. I*, p. 545).

¹Mr. Mawson testified: "After making a comparison of the defendant's dictionary with numerous English dictionaries, I came to the conclusion that the defendant's dictionary, or rather the Price's dictionary [*i. e.*, British Empire Dictionary] on which it is based, is an independent production derived from various British sources, certainly not derived in any sense of the word from Webster's" (*Rec. vol. I*, p. 541, fol. 2162).

²*Opinion below, Rec. vol. III*, p. 2063.

about,—70 per cent. from Imperial and 16½ per cent. from Cassell's, or this 76½% may have been divided between these two books in any other proportion. The burden of proof is on defendant, and there is no proof,—not even the basis for a guess. *Non constat* that a single word was taken from the Imperial for the whole 70% of words common to that work might have been made up from some or all of the other dictionaries named in the list. There are, however, indications that Cassell's Dictionary was heavily used by defendant's author.¹ Seventy per cent. of *unexplained* identity between two books strongly suggests copying,—but not where it is shown that almost all of it could equally well have been taken from some other book and there are indications that such other book was used. But at the very most, the table relied on by the court to support its finding shows not more than 15½ per cent. of identity with the Imperial, not explainable by this same table as due to use of other books, and concededly from 28 per cent. to 40 per cent. of common identity between dictionaries is not significant of any copying or use (*Opinion below, Rec. vol. III, p. 2063*). It is unfair to select a single item in the table, and disregard what the table shows as a whole. Moreover, the identities between the Imperial and defendant's book, such as they are, have not been examined to see whether they can be explained as due to use of a common source, or the use of synonyms, stock phrases and the like, or necessary coincidence,—none of which would be any indication of copying or use. Johnson's Dictionary seems to have been a common source for all subsequent dictionary makers, including Webster, and this explains much of the similarity between

¹See *Appendix, Subdiv. III.*

them.¹ The burden is on defendant throughout, and valuable property rights should not be sacrificed upon such uncertain speculations. No evidence was offered either to show use of the Imperial or to rebut such use, for neither party claimed it. It was error to thus rest the decision upon a matter not in issue, and not supported by any evidence.

If this matter is to be decided upon probabilities without proof, the probabilities are against the fact that the British Empire Dictionary was copied to the extent of 70% of its contents from the Imperial Dictionary of 1883. This would have infringed the British copyright, and a violation of law will not be presumed. Moreover, the British Empire Dictionary was issued by reputable publishers; it purports to be an original compilation by the Rev. E. D. Price, and there is nowhere any claim that it was based upon Ogilvie's Imperial Dictionary. The court below ruled that the title page of a dictionary is *prima facie* evidence of its literary source.

In view of the trial court's finding against the literary descent claimed by defendant, and its express rejection of defendant's evidence upon this issue, it is unnecessary to discuss that evidence here in detail, and it is relegated to the appendix.² The nature of that evidence, and of the answer to it has been indicated.

The markings in "Defendant's Exhibit C" and in the exhibits marked by Prof. Peck are utterly unfair and unreliable. No such identities or similarities exist as these markings purport to indicate. This was demonstrated upon Peck's cross-examination,³ and actual in-

¹Mawson, *Rec. vol. I*, p. 550; Peck, *Rec. vol. III*, p. 1980. "Parallel Column Exhibit," p. 32.

²Evidence of literary origin of defendant's book, see *Appendix, post*, Subd. III.

³Peck, *Rec. vol. II*, pp. 1616-1659.

spection and comparison of the books render the point indisputable.¹ Defendant's calculation of percentages of identity and similarity based upon these markings is worthless because made on a false and misleading basis.² In calculating the Webster percentage, the witnesses used a different and smaller denominator than they used in calculating the percentages of identity with other dictionaries, thus making the Webster percentage larger and the other percentages smaller.³ Such percentages so calculated cannot be compared with each other.

In defending the inconsistencies and variations between defendant's dictionary and the Webster's Dictionary on which it is alleged to be based, Professor Peck made some striking admissions. For example, in attempted explanation of the list of words where defendant's dictionary followed the usual English form of spelling as contained in the British Empire Dictionary, and not Webster's spelling, though the latter is now the preferred and usual American form,⁴ Prof. Peck testified that in most cases, defendant's form of spelling was the preferred, or *only form* in "*Worcester's Dictionary*"; and in some cases, that defendant's form was "allowed" or even "preferred" by the Standard or Century dictionaries.⁵ But *this proved complainant's case*, for it showed that defendant's book did not conform to what is expected in a Webster Dictionary. Worces-

¹For convenience of comparison, a number of definitions marked by Peck as coming from Webster are printed in juxtaposition in *Appendix*, Subdiv. III. "Complainant's Parallel Column Exhibit in Answer to Peck's Exhibit" also demonstrates the worthlessness of Peck's opinion evidence.

²See *Abstract of Testimony*, in *Appendix*, Subdiv. III.

³*Watrous, Rec. vol. III*, pp. 2034-2038; *Peck, Rec. vol. III*, pp. 1962-1968.

⁴*Rec. vol. I*, pp. 525-9.

⁵*Rec. vol. III*, pp. 1922-1937.

ter and Webster represent two recognized and different schools, especially and irreconcilably different in the matter of spelling. Peck admits this, and it is a matter of general knowledge.¹ When a purchaser wants a Webster's Dictionary, with Webster spellings, he should not have passed off on him a book with different and "Worcester" (*i. e.*, English) spelling.

Peck also severely criticised Webster's Dictionary of 1847. He pointed out many things which he termed blunders or mistakes. He disagreed with Webster's rules for spelling, upon which Webster was particularly insistent, such as the use of double "l" in words like "dullness," "skillful," etc., and "er" instead of "re" in words like "center," etc. He said defendant's spelling was right, and that Webster's was wrong. He declared that defendant's book was *more "Websterian" than Webster himself*.² Speaking of Webster's Dictionary of 1847 he testified:

"Now, today, I would not have it, or use it, or think of using it; it is very archaic" (x-Q. 90, *Rec.*, p. 1968). "The more I study it, the less I think of it. . . . He was tainted by Johnson" (x-Q. 160, *Rec.*, p. 1980).

Why then, in view of all this, should it be presumed or guessed that the English author of defendant's book, writing in 1899, used this much criticised text, as the basis of the British Empire Dictionary?

Peck also gives a long list of alleged errors or mistakes in Webster.³ If all, or any, of these errors were common to the two books, it would be strong evidence of copying from Webster. *But not one of these errors*

¹*Peck, Rec. vol. III*, pp. 1970, 1972, 1974, 1986, 1987, 1988, 1572-1575.

²*Peck, Rec. vol. III*, pp. 1940-1949, 1959, 1975.

³*Peck, Rec. vol. III*, pp. 1940, 1949, 1959, Qs. 20, 41.

was followed by defendant, which is at least some evidence that Webster was not the basis of defendant's book. Peck further testified that he did not know who compiled defendant's book.¹ And the defendant itself does not know.² Without any knowledge or information as to the source, origin, or authorship of its book, defendant applied the name "Webster" to a British book, which itself did not even purport to be based on Webster, and issued the extravagant and misleading advertisements hereafter mentioned.³

An examination of the words and definitions marked by Professor Peck and asserted to have been obviously taken from Webster shows that it is far more likely that they were taken from some one or more of these other British dictionaries, because they follow peculiarities and variations contained in such dictionaries and not in Webster.⁴ This is a strong indication that they and not Webster were used, for why should changes be made without reason?

Defendant's claim, made below, that out of 30,000 words defined in defendant's dictionary, "about 16,550 are defined identically as Webster defined them" is absolutely unfounded, and there is no evidence in the record to that effect. In truth, there is no evidence whatever that Webster's Dictionary was used in compiling the defendant's book. Mr. Roe, the author of the "Crown Dictionary", stated to one of the witnesses that he compiled it from the "British Empire Dictionary"

¹*Peck, Rec. vol. III, p. 1977, x-Q. 138.*

²*Wright, Rec. vol. II, p. 1095, fol. 4377.*

³*See infra, Point IV, post, p. 89 et seq.*

⁴*See Abstract of Testimony*, where the definitions are brought together for ease of comparison. See also "Complainant's Parallel Column Exhibit in Answer to Peck's Exhibit."

without consulting or using any edition of "Webster's Dictionary".¹

It is submitted, that there is not even a scintilla of evidence that defendant's book was based either upon Webster's Dictionary, or upon the Imperial Dictionary. The burden was on defendant, and there was a complete failure of proof.

What Is a Genuine "Webster's Dictionary"?

Witnesses have testified that in buying defendant's book they wanted and expected to get "a genuine Webster's Dictionary." What is a "genuine Webster's Dictionary"? Genuineness is a question of identity. It is a question of fact, not of law. The thing really intended and designated by a name is the genuine thing of that name. "Genuine" means "not false, fictitious, simulated, spurious, counterfeit."² In this sense, the complainant's books and no others are the genuine "Webster's" dictionaries. It has been repeatedly held in litigated cases that complainant's books are the ones known and intended by the name "Webster's."³

As Judge Denison puts it, that is the "*primary*" meaning of the term (198 Fed. 369). This then is the definition of a genuine Webster's Dictionary. And

¹*Taber, Rec. vol. I, pp. 611, 612.*

²Per Woodruff, J., in *Baldwin v. Van Dusen*, 37 N. Y. 487, 492. "Actually belonging to, or proceeding from the reputed source, origin, or author; having the origin or character which it appears or is claimed to have; authentic; not counterfeit, spurious, false or adulterated," etc. *Webster's New International Dictionary*.

³*Merriam v. Ogilvie*, 149 Fed. 858, aff'd. (C. C. A.) 159 Fed. 638; *Merriam v. Saalfeld* (C. C. A.), 190 Fed. 927, 198 Fed. 369, where the Court said: "The term 'Webster's Dictionary' had in the minds of the dictionary public the meaning that the book so named or marked was the Merriam book."

this is the public understanding, as shown by the testimony of ordinary and average purchasers, as well as of scholars and educators.¹ "It is a question of evidence in each case whether there is false representation or not." *Howe Scale Co. v. Wycoff, Seamans & Benedict*, 198 U. S. 118.

Some of the definitions of a genuine Webster's Dictionary given by the witnesses are reproduced in the margin.²

The obsolete editions upon which the copyright has

¹See Point II, *ante*, pp. 13 *et seq*; *Abstract of Testimony*, Appendix, *post*, p.

²A dictionary published by the original publishers, their agents, or authorized successors. *Rec. vol. I*:—*Foley*, fols. 1126-1128; *Burlingham*, fols. 1274-1277; *Hughes*, fols. 1296, 1297; *McMahon*, fol. 1230; *Cooper*, fol. 467.

"I would consider the only genuine Webster a publication by the publishers who were so long known as the publishers of the Webster's Dictionary,—as the only genuine Webster's Dictionary, whether the copyright had expired or not." *Seybel, Rec. vol. I*, fol. 1015.

"A dictionary published by the Merriam Company, known as Webster's Dictionary". *Seybel, Rec. vol. I*, fol. 1003.

"If he wanted a genuine Webster's Dictionary what would you show him? A Webster's International" (*i. e.*, Merriam's). *McKnight, Rec. vol. II*, fol. 5703.

A book though in fact based on the work of Noah Webster, but published at the present time by some other house than Merriam, "I would not consider genuine." *Cowles, Rec.*, fols. 415-419.

"I wanted something that was a real Webster,—not anything based on it. Any book might be based on anything and still be entirely different." *Fisher, Rec. vol. I*, fols. 1749-1756.

The standard or test of genuineness is whether it is the book generally used in the schools, the one considered as authority in Universities, Colleges and by Courts, judges and literary people. *Buddecke, Rec. vol. I*, fols. 1054, 1055; 1073, 1074; *Gifford, Rec. vol. I*, fols. 972, 973.

One "with the name Webster and what Webster's Dictionary contains,—the contents" *Smack, Rec. vol. I*, fol. 1437.

expired are, of course, "*historically genuine*," but they are not modern genuine Webster's dictionaries.¹

An order today for a Webster's Dictionary would not be properly filled by one of these ancient books. All agree that the average purchaser expects and desires to receive the up-to-date edition of the book named. The obsolete books are properly described as "Webster's Dictionary" only when accompanied with a specification of the edition intended; otherwise the current editions are implied.

There is an obvious distinction between reprints of dictionaries, encyclopædias, and other reference books, which are continually changing through successive editions, though the name remains, and reprints of literary works like Emerson's *Essays*, or Dickens' novels.²

A purchaser of a reprint of Emerson's *Essays*, by whomever "published," obtains a genuine copy of the identical literary composition he intended to buy. Such works are not subject to change, and the name means the same thing after expiration of copyright as it did before. It identifies the same composition. But a present day purchaser of a Webster's Dictionary expects to obtain what Webster's Dictionary has become, not what it was sixty years ago. The name now designates a very different book. For example, because the copyright upon the *World's Almanac* of 1880 has expired, would an almanac for 1915, published by the *New York Journal*, be a "genuine *World's Almanac*"? Would it be any more so, if a few facts were taken

¹*Rec. vol. I*.—*Mead*, fol. 1916; *Funk*, fol. 1463; *McKnight*, fols. 5687; 5703; *Gifford*, fol. 982; *Putnam*, fols. 1575-1584.

²*Putnam, Rec. vol. I*, fols. 1586, 1587; *Mead, Rec. vol. I*, fols. 1905, 1906, 1919-1921; *Haymaker, Rec. vol. I*, fols. 1477, 1478.

from the expired book? Of course the latest edition by the original proprietors of that work is today the only genuine "World's Almanac," and not even the obsolete 1880 edition is now designated by that name, *except historically, and in connection with a descriptive date.*

Accordingly it is plain, both from the evidence, and from the inherent necessities of the situation, that a genuine "Webster's" dictionary to-day means the current representatives of the established series, issued under that name by the same interests as have always been the responsible proprietors of it. To the better educated portions of the community, it may mean the Merriam's compilation with Noah Webster at the original source, as the Court below suggested.¹ But to the ordinary and average purchaser of small dictionaries, including school children, it is doubtful whether the name has such a specific meaning. They know little or nothing of Noah Webster, or his literary work. Many think it was Daniel Webster who wrote the dictionary.² They simply know that there are current "Webster's" dictionaries of high reputation, and to such persons a genuine "Webster's" dictionary is one belonging to that series and issued by the same proprietors.

Defendant's book is not a genuine "Webster's" dictionary in any sense of the term. (1) If defendant's name, or that of its author were Webster, its dictionary would be a "Webster's" dictionary, although not *the* Webster's Dictionary. But such is not the fact. (2) If defendant's book were a reproduction of any

¹*Opinion below, Rec. vol. III, p. 2060.*

²See for example, *Rec. vol. II*, pp. 1456, 1462, 1488, 1493, 1504, 1505.

previous genuine "Webster's" dictionary, copyrighted or not, it would be a genuine "Webster's" dictionary of that edition. But such is not the fact. (3) If defendant's book were an "honest compilation or abridgment at the present time of Webster's work" (see opinion, *Rec. vol. III*, p. 2059), it would be "entitled to describe itself as such" (*ibid.*). Complainant never even remotely contended otherwise. But such is not the fact.

Under any of the above conditions, all that complainant claims, or could claim, is that defendant must take pains to prevent, and do nothing needlessly to increase, the confusion of its book with those of complainant.

But none of these conditions exist, and defendant has no justification for calling its book "Webster's." The words "Webster's Dictionary" are a false representation as applied to defendant's book. It is false in every sense of the term:—(a) False, because defendant's book is really the "British Empire Dictionary" in disguise. (b) False, because Webster is not the author or proprietor of defendant's book. (c) False, because defendant's book is not the book now universally known as Webster's Dictionary. (d) False, because defendant's book is not even a book formerly, at any time, known as Webster's Dictionary. (e) False, because defendant's book is not even an abridgment or revision of any edition of Webster's Dictionary, but on the contrary, is a servile and slovenly copy of an English dictionary, widely variant in spelling, definitions, accuracy and scholarship from any and all genuine Webster dictionaries. (f) False, because defendant's book does not come from the same source as the previous well-known "Webster" dictionaries, as

is now indicated by the acquired secondary meaning and trade significance of the name. It is a simulated spurious and counterfeit,—not a “genuine” Webster’s Dictionary.

IV.

DEFENDANT HAS FRAUDULENTLY MISUSED THE NAME “WEBSTER’S” ON ITS BOOKS AND IN ITS ADVERTISEMENTS. AN INJUNCTION SHOULD HAVE BEEN GRANTED.

Facts showing actual and intended fraud.

The principal facts establishing unfair and intentionally dishonest competition are briefly stated here.

In the month of January, 1908, the *Ogilvie* case was decided in the First Circuit¹ holding that the Merriams had no exclusive right to the name “Webster” in connection with dictionaries, but the dictionary in that case was indisputably based on the edition of 1847, the copyright of which had expired in 1889. This decision was known to both of the defendants in the present cases,² who construed it as authorizing every one to make an unrestricted use of the name “Webster”.³ Thereupon Mr. Wright, the president of the Syndicate Publishing Company, whose business was that of “makers and promoters of premium specialties”.⁴ conceived the idea of publishing and selling a dictionary under the name of Webster’s Dictionary. Accordingly, in July, 1908, he bought the plates of the

¹*Merriam v. Ogilvie*, 159 Fed. 638.

²*Wright, Rec. vol. II*, fols. 4343-4346; *Leon, Rec. vol. II*, fols. 4963, 4964.

³*Wright, Rec. vol. II*, fol. 4466; *Leon*, fol. 4964.

⁴*Rec. vol. II*, p. 1190.

"Crown Dictionary" from a Mr. Klopsch with the predetermined intention of changing the name of the book from "Crown" to "Webster's Dictionary".¹ He conceded in his testimony that he regarded the copyright of the text of the "Crown" dictionary as of no value whatever,² and that he knew that duplicate plates and equal publishing rights had already been sold to the Cupples & Leon Co. He further testified that he had no knowledge as to the source or origin of the literary matter of this dictionary, and did not know whether or not it was in fact based upon any former Webster's Dictionary; that he did not consult its putative author Edward T. Roe, or make any other investigation, and that all he knew about the book was what appeared upon its title page.³ This title page simply stated, in a subordinate descriptive way, that the book was "based upon the unabridged dictionary of Noah Webster, LL.D., and revised and brought up to date in accordance with the most recent eminent English and American authorities by Edward T. Roe, LL.B."⁴ Defendant forthwith changed the title from "Crown Dictionary" to "Webster's New Illustrated Dictionary" and later to "Webster's New Standard Dictionary", suppressed the name of Roe as author and substituted Webster's name, removed the original copyright notice, by which the book could have been identified, substituted a new notice with a current date, and proceeded to print and sell, under the new title page, from

¹Wright, *Rec.* vol. II, fol. 4384.

²Wright, *Rec.* vol. II, fol. 4321.

³Wright, *Rec.* vol. II, fols. 4377, 4382.

⁴See Exhibit, Crown Dictionary, and see title page printed on insert facing p. 90 of this brief.

THE
BRITISH EMPIRE
DICTIONARY
OF THE
ENGLISH LANGUAGE

*TO WHICH ARE ADDED SELECTED LISTS OF PROPER
NAMES, WITH PHONETIC PRONUNCIATION, AND
ABBREVIATIONS IN COMMON USE,
WITH THEIR MEANINGS.*

EDITED BY
REV. E. D. PRICE, F.G.S.



LONDON:
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SOUTHAMPTON STREET, STRAND.

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BRITISH
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DICTIONARY

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THE
DICTIONARY
OF THE
ENGLISH
LANGUAGE
AND
TREASURY
OF FACTS

THE EDITOR

WHEN IN DOUBT CONSULT THE "CROWN"

*Exhibit a
H. B. Brown*



CROWN DICTIONARY

OF THE
ENGLISH LANGUAGE

Based upon the Unabridged Dictionary of Noah Webster, LL.D.,
and Revised and Brought Up to Date in Accordance with the
Most Recent Eminent English and American Authorities

BY
EDWARD T. ROE, LL.B.

With Appendix containing Synonyms and Antonyms, Foreign Phrases, Language
of Flowers, Coins, Weights and Measures, Differences in Time, etc., etc.



THE CHRISTIAN HERALD
LOUIS KLOPSCH, Proprietor
NEW YORK

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WEBSTER'S ^{NEW} STANDARD DICTIONARY

ILLUSTRATED

Based Upon the Unabridged Dictionary of the
English Language

OF
NOAH WEBSTER, LL.D.

Revised and brought up to date in accordance with the most
recent eminent English and American authorities

Containing
THE 1910 CENSUS
with Maps

NEW YORK
SYNDICATE PUBLISHING COMPANY
1911

(Back Title.)

WEBSTER'S
NEW STANDARD
DICTIONARY
ILLUSTRATED

(Front Cover.)

WEBSTER'S
NEW STANDARD
DICTIONARY
ILLUSTRATED

WITH NEW U. S. CENSUS
[Copyright 1911 by Frank E. Wright.]

the Crown plates what defendant announced as the new and latest edition of "Webster's Dictionary".¹ Roe previously had copied this book from the still older British Empire Dictionary, as found below, and changed its name to Crown. Fac similes of the three successive title pages and cover inscriptions of this book are inserted opposite hereto, in which the fraud may be traced, through Roe's "quip modest" in the Crown, to defendant's "seventh degree"—the fraud direct, in "Webster's New Standard Dictionary."

This unnecessary change of name from "Crown" to "Webster's" is a recognized badge of fraud (38 Cyc. 794, 795 and cases cited). The only reason for the change obviously was to get the benefit of the popularity of complainant's dictionaries, for if it had been desired to sell the book solely upon its own merits, the names Crown and Roe would have served as well as any other. But by changing the name to Webster's New Standard Dictionary, defendant would find a market ready made. Leon testified that his company changed the name to Webster's because several of his large retail customers requested it,² to help the sale, a circumstance deemed almost conclusive evidence of fraudulent intent in the *Camel's Hair Belting* case.³ The defendant's officers simply say that they changed the name to Webster's because they had a legal right to do so.⁴ "We knew the word Webster was public property . . . without restrictions."⁵ The president of the defendant,

¹See exhibit books, advertising exhibits, and *Wright's* testimony, *Rec. vol. II*, p. 1100, fols. 4397-8; 4417-4421.

²*Leon, Rec. vol. II*, p. 1257, fols. 5026, 5027.

³*Reddaway v. Banham* [1896] App. Cas. 199.

⁴*Swift, Rec. vol. II*, fols. 4577, 4582. *Wright, Rec. vol. II*, fol. 4256.

⁵*Wright, Rec. vol. II*, fol. 4466.

Wright, also testified that his reason for omitting from the title page the name of Edward T. Roe as author, and the copyright notices by Louis Klopsch dated 1904, was to differentiate his book from Cuples & Leon Co.'s edition of the same book. He did not pretend that the books differed in any substantial respect. The honest method of differentiating, of course, was to continue the name Crown Dictionary, and the confusion was caused solely by the unnecessary change of title to Webster.

From the very beginning, defendant's announcements and advertisements of its dictionary have been false and misleading. The claim of newness, thorough revision, etc., is wholly unjustified as the court below found.¹ For example, in a circular purporting to describe its book defendant says, *inter alia*:

"Description of
WEBSTER'S

New Illustrated Dictionary.

"This most convenient and latest of all Dictionaries", etc. . . . "Its recent publication and careful revision enables it to define and treat a large number of words of recent coinage that cannot be found in any other dictionary", etc., . . . thus the evidences of painstaking revision are found on every hand".²

Yet it had to be confessed that this dictionary was printed from the plates of the "Crown" Dictionary,³ which was a mere reprint of the still older British

¹*Rec. vol. III*, fols. 8277-8.

²"Complainant's Exhibit, Defendant's Advertisements," p. 122, *Rec. fol.* 4501.

³*Answer, Rec. vol. II*, 958, 1092; *Wright, Rec. vol. II*, pp. 1089, 1127.

Empire Dictionary. The testimony of President Wright shows that there was no real revision, and that defendant had no editorial staff. Nothing is charged for editorial work in defendant's books of account.¹ The claim that Professor Peck did any revising is denied by Peck himself.² The undisputed evidence is that in the transmutation of the Crown Dictionary into a Webster's Dictionary the total word changes consisted in the addition of seventy-five (75) words, and the substitution of one hundred and twenty-five words in lieu of words omitted in order to make room for the substitution.³ This was the actual extent of the careful painstaking revision claimed by defendant. It was made by punching holes in the original Crown plates and plugging in "flash" terms of recent currency in order to give color for the claim: "latest of all dictionaries".⁴ This claim of "recent and careful revision" when applied to a "Webster" dictionary clearly implies that it is a revision of the "Webster" dictionaries previously in the market, *i. e.*, that it is a revision of complainant's established work.

In February, 1911, defendant began a newspaper coupon plan of distribution and sale of its dictionary. This plan first originated with a licensee of complainant who used it in connection with the sale of complainant's Webster's Condensed Dictionary. Defendant *began by imitating the plan, and by actually copying the advertisements* of complainant's book.⁵ Defendant's

¹Wright, *Rec. vol. II*, pp. 1090, 1106, 1097.

²Peck, *Rec.*, pp. 1563-4.

³Baker, *Rec. vol. I*, p. 124, fols. 495, 496.

⁴Baker, *Rec. vol. I*, p. 127. Wright, *Rec. vol. II*, pp.

⁵Murphy, *Rec. vol. I*, fols. 2465-2488; Britton, *Rec. vol. I*, fols. 2367-2375; Washburn, *Rec. vol. I*, fols. 2537-2608.

advertisements in the *Pittsburgh Post* of February 12, 1911, *Peoria Star* of November 4, 1911, the *Los Angeles Times* of December 3, 1911, and the *Mobile Item* of December 19, 1911, are almost fac-simile copies of the full page advertisement of complainant's Webster's Condensed Dictionary which appeared in the *Boston American* of September 12, 1910.¹ The striking figure of "Uncle Sam" holding complainant's Webster's Condensed Dictionary is exactly copied with defendant's Webster's New Illustrated Dictionary substituted. The language and display is almost all copied, and applied to defendant's book, and a part of it is here reproduced for comparison:—

**Advertisement of
complainant's Webster.**

**"HERE IS YOUR PROTECTION
"AT HOME OR ABROAD.**

"The result of good fortune is the knowledge of good English. At home or abroad one should have this knowledge. Go where you will, into the depth of ignorance or the height of education, and you will find yourself in need, at all times, of that one great fortune, and that is—a handy reference guide of the correct English language. Confusion of mind to quick answer is the cause of a great deal of embarrassment amongst all classes of people.

"There is only one enlightenment to the correct and true path of knowledge, and that is through the WEBSTER'S CONDENSED DICTIONARY—a book that no family, student or business man can afford to be without. THE BOSTON AMERICAN offers to help you along this path, if you will but read what follows."—*Boston American*, Sept. 12, 1910.

**Advertisement of
defendant's Webster**

**PROTECTION
AT HOME OR ABROAD.**

"The result of good fortune is the knowledge of good English. AT HOME OR ABROAD one should have this protection and knowledge. Go where you will, in the depth of ignorance or the height of education and you will find yourself in need, at all times, of that one great fortune, and that is—a handy reference guide of the correct English language. Confusion of mind to quick answer is the cause of a great deal of embarrassment amongst all classes of people.

"There is only one enlightenment to the correct and true path of knowledge, and that is through the WEBSTER'S NEW ILLUSTRATED DICTIONARY—a book that no family, student or business man can afford to be without. The *Pittsburgh Post* offers to help you along this path, if you will but read what follows."—*Pittsburgh Post*, Feb. 12, 1911.

¹See Scrap-book Exhibit, Defendant's Advertisements, pp. 63, 111, 110, 107, 101.

Several of defendant's advertisements contain the following:—

Caution

When a Dictionary is offered you which is any way similar to this one, observe the exact wording shown herewith.

You want the latest. Do not be deceived. This IS the latest.

WEBSTER'S
New Illustrated
DICTIONARY
 With U. S. Census and Maps¹

The following from the *Waterbury Republican* of August 31, 1911, is a specimen of a form of advertisement largely used,² and which defendant in its brief below said was "of invaluable assistance in the sale of dictionaries":—

¹From Warren *Evening Mirror*, Feb. 27, 1912. Exhibit, Additional Advertisements, p. 6. A similar "caution" against deception appeared in other papers. See Exhibit, Additional Advertisements of Defendant's Book, pp. 4, 9.

²"The newspaper notices were largely in the form of news articles," *Wright, Rec. vol. II*, fol. 4391.

DICTIONARY HAS ITS IMITATORS

**Only Way to Secure Wonderful
Book, Which Contains Lat-
est Information.**

COUNTERFEITS COSTLY

**Coupon Explains Means by
Which the Genuine Article
Can be Secured.**

There are very few of us who realize the dangers lurking in substitutes and counterfeits. We have a Federal law that protects us from the dangers of impure foods. The Government is ever vigilant in guarding us against spurious coins and currency. But we are left to our own resources in the matter of choosing our apparel, our literature and our means of learning, and many times are we deceived by having foisted upon us something of this character that is detrimental to our physical growth and development.

The only protection we have is to guard against substitutes and imitations. It stands us in hand to beware of counterfeits of any and all kinds.

As a means of encouraging education The Republican presents Webster's New Standard Dictionary, illustrated. As soon as the success of this great distribution was assured cheap imitations of The Republican dictionary were offered to the public at seemingly low prices. But it must be remembered that counterfeits are costly at any price. Some unscrupulous publishers have taken their old dictionaries that are out of date, changed the title pages, pasted in a few pictures

and other irrelevant matter, and now offer these to the public, with the claim that they are of late compilation, because this year's date is on the title page. As a matter of fact, they are printed from old plates that served their usefulness years ago, and as our language is very changing, they are utterly unreliable and useless.

It is said that imitation is the sincerest flattery. The Republican's successful educational campaign is doubtless envied by those who wish they might have thought of such a plan first. But there is only one Webster's New Standard Dictionary, illustrated, and it is presented by The Republican. There is only one way to get it, which is explained under the dictionary coupon on another page, and we trust all of our readers will avoid imitations and get the genuine as offered only by The Republican.¹

Equally vicious, untruthful and fraudulent is the following from *Seattle Post-Intelligencer* for January 3, 1912, *published during the pendency of this suit*:—

"It is the ordinary buyer of books that must be careful and guard against counterfeits. The Post-Intelligencer is distributing Webster's New Illustrated Dictionary. The object is to put an authentic and authoritative reference book into every home reached by the *Post Intelligencer* and to encourage education. As there are dictionaries on the market that are not all they are claimed to be, it behooves the average book buyer to be careful. There is only one way to get this wonderful book offered by the *Post-Intelligencer*, which is explained elsewhere under the dictionary coupon. It will be wise to clip that coupon today and get started in the right way to get the best dictionary on the market."²

¹Exhibit, Defendant's Advertisements, p. 67 (Aug. 31, 1911).

²Exhibit, "Additional Advertisements of Defendant's Book,"

These advertisements, by necessary implication, if not in direct terms, assert that defendant's book is the genuine, authentic Webster's Dictionary familiar to the public, and that complainant's books are imitation and counterfeit "Webster's", especially in view of the fact that defendant was competing on the same plan of distribution with a customer and licensee of complainant. This was a direct passing off of defendant's book as and for complainant's book.

Upon the cartons or wrapper in which defendant's dictionary is sold a label is used in the following form, and nothing else to indicate the actual publishers or to distinguish the books:—

WEBSTER'S
NEW STANDARD
\$4.00 **DICTIONARY** **\$4.00**
ILLUSTRATED
LIMP LEATHER—RED EDGES

And deceived purchasers testified that the dictionary they bought as and for a Webster came in the above wrapper.¹ The book was actually sold for only 98 cents, and the representation of it as a four dollar dictionary tended to deceive purchasers. A similar fraudulent device was enjoined in one of the early *Webster dictionary* cases (*Merriam v. Texas Siftings Co.*, 49 Fed. 944).

Defendant prosecuted this newspaper campaign with great vigor. Ambiguous, misleading and fraudulent statements run all through its advertisements. In all of them defendant describes its book as

¹*Record*, fols. 1187; 1271; 1364.

the well-known Webster's Dictionary in its latest edition, and phrases like the following are characteristic:

"'The Post' Will Distribute to Its Readers Entire New Edition of Webster".¹

"New Webster Dictionary is Placed Within Reach of 'Journal' Readers at Moderate Expense".²

"Complete, Accurate and authentic from cover to cover."³

"The latest, most accurate and authentic dictionary obtainable today . . . The old one is out of date . . . This is the MODERN dictionary."⁴

"Distribution of Webster's Dictionary."⁵

"Webster's Dictionary is the foundation of education."⁶

"IN SCHOOL . . . Has the unqualified indorsement of school and college authorities throughout the land. Founded on Noah Webster's dictionary, it is the fundamental work of our language. . . . This book has kept pace with PROGRESS and is now the only dictionary that is replete with ALL that is MODERN."⁷

"While he had one of the large dictionaries he found that the small one answered all purposes".⁸

"It is accurate, authentic and modern in every particular."⁹

¹Exhibit, Defendant's Advertisements, p. 112 (Feb. 5, 1911).

²Exhibit, Defendant's Advertisements, p. 70 (Oct., 1911).

³Exhibit, Additional Advertisements, etc., p. 9 (Aug. 16, 1911).

⁴Exhibit, Defendant's Advertisements, p. 71 (Oct. 15, 1911).

⁵Exhibit, p. 84 (Nov. 9, 1911).

⁶Exhibit, Defendant's Advertisements, p. 57 (Nov. 3, 1911).

⁷Exhibit, Defendant's Advertisements, p. 44 (Sept. 28, 1911).

⁸Exhibit, p. 97 (Nov. 6, 1911).

⁹Exhibit, p. 103 (Dec. 23, 1911).

"The St. Louis Post-Dispatch has provided a grand educational enterprise . . . Believing that nothing short of THE BEST will satisfy the demands of our reading public, we have decided upon Webster's New Standard Dictionary . . . which is the LATEST, most accurate and authentic dictionary obtainable today. Everybody should have a *New Dictionary*. . . The old one is out of date. . . This is the Modern Dictionary. . . This is not a 'Condensed' dictionary: it is not 'made over' for the purpose . . . But it IS an HONEST dictionary, bound in GENUINE limp leather; . . . it is a MODERN dictionary, brought down to this very day with 1911 *copyright*."¹

In view of the fact that it is complainant's dictionaries alone which have been universally adopted as standard in the schools, the fraud is manifest.

While defendant has taken the customary care to have plenty of what Judge Lacombe has called "arguable differences"², surely these advertisements are plainly fraudulent and they were actually deceptive.³ Surely they demonstrate the actual fraudulent intent with which defendant changed its title from *Crown Dictionary* to *Webster's Dictionary*. Without the fraudulent title the fraudulent advertising would have been impossible. The sure way to stop the fraudulent advertising is to enjoin the fraudulent title.

These advertisements were published in four hun-

¹Exhibit, Defendant's Advertisements, p. 65 (Sept. 14, 1911).

²*Scheuer v. Muller* (C. C. A.), 74 Fed. 225, 228; *Paris Medicine Co. v. Hill*, 102 Fed. 148, 150; *Liebig's Extract of Meat Co. v. Chemist Co-op. Soc.*, 13 R. P. C. 635.

³See testimony of purchasers actually deceived, *ante*, pp. 35-37, and Appendix, *post*, pp. 41 et seq.

cred newspapers, and the defendant argued in its brief below that it had succeeded by this method of advertising in selling as genuine "Webster's" between 500,000 or 600,000 copies of what is really the British Empire Dictionary. Wherever such methods of advertisements were employed, complainant's business was temporarily brought almost to a standstill.¹

No cessation of fraud before or after suit.

Until this suit was imminent and until just before the filing of the bill, defendant made not the slightest pretense of distinguishing its dictionary from the dictionaries of complainant. Aside from the affirmatively fraudulent features of its advertisements, the name Webster, used without any explanation, itself amounted to an artifice fitted and designed to deceive (*Singer case*, 163 U. S. 169). The name itself would deceive (*Hall's Safe case*, 208 U. S. 554). Even after the bill was filed, many of defendant's advertisements contain no explanatory statement.² And even after the preliminary injunction, defendant furnished to newspapers plates for advertisements without any explanatory statement.³ After notice of the impending suit, however, and recognizing that it had not complied with the rule declared in the *Ogilvie case*, defendant inserted in most but not in all,⁴ of its advertisements, and upon its books an alleged explanatory statement (*Ex. vol. II*, p. 1152).

¹*Ex. vol. I*, pp. 229, 235-6, 238, 240, 239.

²See Exhibit, Defendant's Advertisements, pp. 219, 225, 227, 229, 232, 234, 235, 236, 237, 239, 241, 242, 243, 244.

³*Ex. vol. II*, 1152-3. Exhibit, Defendant's Advertisements, pp. 231, 232, 234, 235, 236.

⁴See Exhibit, Defendant's Advertisements, pp. 231, 232, 234, 235, 236, 237, 239, 241, 242, 243, 244.

Decision below and comments thereon.

The question of defendant's actual fraud was not specifically passed upon. The theory and grounds upon which the bill was dismissed are shown by the quotation printed in the margin¹, from which it is

¹Judge Hand said (*Rec. vol. III*, pp. 2067 *et seq.*):—

"Therefore, the defendants had the qualified right to call their books 'Webster's,' provided they properly distinguished so as to cut out the secondary meaning, and the only question which can remain is, whether the statement upon the title page of the books is sufficient notice, since the books were properly marked upon the back. The form of the notice is that set forth in the final decree of the Circuit Court for the District of Massachusetts, as contained in 190 Fed. R., at page 931. The only criticism which I can make upon the printing at the top of the page is that it is in rather small type. Had the attitude of the complainant been different when the defendants approached it with a view of adopting their make-up to the terms of the Massachusetts decree, I might now be willing to take up the question whether that notice ought not to be more conspicuous upon the page, but I am not disposed to indulge this complaint in such a way in the case at bar. When the defendants each approached its officers in a *bona fide* effort to accommodate themselves to the utmost rights which the complainants had up to that time enjoyed, they were met with a demand for absolute discontinuance of the name; they are met with it here. This was illegal and had been so adjudged against this complainant in the very decree which is the basis of any supposed right they may have in the name 'Webster.' They certainly by such a claim absolved the defendants from any nice adaptation of their typography to the terms of that decree, and I shall not inquire whether it gives the fullest protection to which the complainant is entitled.

* * * * *

"I have looked over all the advertisements of the Syndicate Publishing Company, which make a very shoddy kind of appeal, but after the date when the defendants attempted to come to terms with the complainant they appear usually to bear the addition which the complainant procured as the measure of its relief in the Ogilvie case. As to those which do not and which for the most part are in the form of news articles, I find no evidence to contradict the *bona fides* of the defendant's efforts to conform the advertisement with the decree and I am not disposed to charge them with such as continued to appear. The prominence and form of the suffix must be held satisfactory in

seen that the decision was rested entirely upon three points, viz:— (1) the alleged literary descent of defendant's book; (2) the alleged adoption by defendant of an explanatory suffix; and (3) the incomprehensible statement that bringing this suit was "illegal", and a tort against defendant. Of these in enumerated order:—

(1) The question of literary descent has been already discussed, and the error indicated (See *ante*, p. 66 *et seq.*).

(2) The court's suggestion that defendant adopted an explanatory suffix before suit brought, and that complainant is entitled to no relief because it did not accept that as the full limit of its rights against this book is erroneous both in law and fact.

view of the complainant's attitude towards the defendant when approached, and its illegal claim of a monopoly in the name. If the defendant was content to yield to the terms of the Ogilvie decree, it might upon the complainant's demand have been subject to some modification of its advertisements as of its title page. That right justified no such proceeding as this, designed to do just what the complainant was forbidden to do in the First Circuit.

"As to the Cupples & Leon Company, I am in more doubt, the testimony of Leon is of very unsatisfactory character and his claims to a dictionary upon which the defendant had done any substantial work, are not justified. The advertisements are not warranted by the facts, for it is in no sense the modern book it professes to be. I do not believe that the defendant knew or in the least cared what was its contents, if it would sell as an up-to-date book. However, that gives no rights to the complainant, so long as its own limited use of the name is not infringed. None of the advertisements attempt to pass off the books as the complainant's, and it cannot object that the public is buying as a modern Webster substantially the old Crown Dictionary. The law may some day protect one man who sells a sound quality of goods so described against another who sells an unsound quality, dishonestly described, but it has not done so yet. Now we trust to the public to find out that they have been hoodwinked, and to distinguish."

First, the opinion itself concedes that the explanatory statement was never adequately displayed or used, either on the books or advertisements, even down to the date of final hearing, which was equivalent to using no notice at all. The position taken that because complainant claimed a right to greater relief, and brought this suit to have that claim adjudicated, the court would not inquire into, or give it, such relief as it proved itself entitled to, is simply too astounding for counsel to comprehend.

Again, the opinion concedes that even long after the commencement of the suit defendant issued advertisements containing no explanations whatever,¹ and other viciously fraudulent advertisements appeared within a few days of the filing of the suit (on Nov. 9th, 1911), without the explanatory suffix, although defendant claims to have adopted it on Oct. 9, 1911.²

Further, a preliminary injunction was granted herein by Judge Coxe on March 20, 1912, requiring defendant to change both the form and display of its explanatory statement, and to add other distinguishing features to its books.³ Defendant denied and contested, both on the preliminary motion and at final hearing, its obligation to use any form of explanation. Not until compelled by the writ of injunction did defendant conform even to the requirements of the

¹See instances given, *ante*, pp. 94-97 of this brief.

²See examples in the scrap-book exhibit of defendant's advertisements, pp. 60, 62, 63, 64, 69, 71, 75, 97.

³The preliminary injunction provided that the Ogilvie form of notice should be used, with the word "not" emphasized; that it should be plainly printed and prominently displayed in a separate line or paragraph by itself; that defendant's name should be printed not only on the title-page but also on the back of the dictionaries, and enjoined any form of title-page, back, or advertisement that was in any way calculated to deceive.

Ogilvie decree. Manifestly complainant was justified in bringing suit, and in refusing to accept defendant's construction and application of the *Ogilvie* decree. The relief granted by Judge Coxe was taken away at final hearing, although the abstract right to it was conceded, and the proofs required a much broader injunction.

Moreover, although defendant was familiar with the requirements imposed in the *Ogilvie* case, it made no pretense of conforming thereto from 1908, when it first adopted the name, until October 9, 1911, and during this period used no explanatory suffix whatever.

Defendant says that on October 9th it ordered the *Ogilvie* form of cautionary notice to be inserted in its books and advertisements. The *Ogilvie* form of notice was:

"This dictionary is not published by the original publishers of Webster's dictionaries or by their successors."

The form of notice used by defendant, until it was compelled to change it by the preliminary injunction granted by Judge Coxe, was as follows:

"This dictionary has been revised and brought up to the PRESENT DATE in accordance with the best authorities and is NOT published by the original publishers of Webster's dictionary or by their successors, but by the well known SYNDICATE PUBLISHING COMPANY of New York City." (*Rec. vol. II*, pp. 1184, 1152.)

Manifestly this changed the required explanatory statement from a warning notice to a boastful recommendation. It is ambiguous and deceptive. It is a merely colorable,—not an honest effort to distinguish. The evident purpose to comply with the letter of the

Ogilvie decree, and yet to frame a notice that would not really distinguish, is proved by the circular letter which defendant sent to newspapers after the injunction herein requiring defendant to change its form of notice and to print it in a distinctive manner. This disingenuousness of this letter (*Rec. vol. II*, fols. 4763-4766), appears in its opening paragraph:

"We are pleased to advise you that the United States District Court has recently confirmed our opinion as to the advisability of clearly marking the difference between our modern up-to-date dictionaries and the antiquated and often obsolete editions offered to the public by other publishers. It is, therefore, necessary that in all our display advertisements, reading notices, coupons or other announcements in your paper the following cautionary notice be inserted:" etc.

This whole letter should be read. It shows clearly that defendant never intended, nor in good faith attempted to distinguish its books. The letter suggests to the newspaper distributors that defendant's position had been sustained in the courts, whereas in truth it had been defeated and enjoined. Such a letter was ill-calculated to insure insertion of the warning words, and defendant is chargeable with the subsequent frequent omission of them. It also shows that defendant went as far in continuing its original practices as the letter of the injunction would allow.

The actually fraudulent advertisements already referred to are themselves actionable, whether or not they contain the suffix; it is not an immunity bath purging all other fraud.

Actual and threatened infringement of complainant's rights, even as limited below, both before and

after suit brought was proved and found. Defendant has at all times denied and contested any obligation upon its part to use any explanatory statement whatever, insisting that the mere printing of its own name in the publisher's imprint upon the book is sufficient.¹

Under the circumstances, actual and complete discontinuance of infringement would be no bar even to the granting of a preliminary injunction, and especially not to an injunction at final hearing, where a denial of it would adjudge defendant's right to continue the infringement.² But this defendant did not discontinue its infringement.

Finally, and most important of all, the main purpose of this suit was to have it judicially determined whether this particular British Empire, or Crown Dictionary is entitled to describe itself as Webster's Dictionary. Defendant has never been willing to quit using the name "Webster's" as the chief title word of this book; it was willing to add some form of suffix, but it would not drop that name. Complainant insisted, and now insists that this particular book is not entitled to be called "Webster's". Defendant refusing to drop the name, this suit was the only alter-

¹*Wright, Rec. vol. II, fols. 4397, 4469.*

²*Clark Thread Co. v. Wm. Clark Co.*, 55 N. J. Eq. 658; *Ricker v. Leigh*, 74 App. Div. (N. Y.) 138; *Saxlehner v. Eisner* (C. C. A.) 147 Fed. 189, 191 (where it is said: "The interposition of such an answer indicates that complainant was quite justified in anticipating that at any time in the future some infringement of such label might be put on the market by defendants"); *Saxlehner v. Eisner*, 88 Fed. 61; *Dwinell-Wright v. Co-Operative Supply Co.*, 148 Fed. 242; *Thomas G. Plant Co. v. May Mercantile Co.*, 153 Fed. 229, 231. "It may have repented but it has transgressed, and it even now asserts rights greater than we think it has. Therefore the injunction must stand." *Herring-Hall-Marvin Safe Co. v. Hall Safe Co.*, 208 U. S. 554, 560.

native. The evidence already recited amply shows that complainant was justified in this demand. Yet the extraordinary statement is made in the opinion below:

"This was illegal and had been so adjudged against this complainant . . . its illegal claim of a monopoly in the name. . . . That right justified no such proceeding as this designed to do just what the complainant was forbidden to do in the First Circuit (*Rec. vol. III*, pp. 2068, 2069, 2070).

As this rests entirely upon a misapprehension of the decision and decree in the *Ogilvie* case, the exact language of such decision and decree is quoted in the margin,¹ from which it conclusively appears:

¹The language of Judge Colt in ordering the injunction was: "The Merriam Company should be enjoined from sending out circulars to the effect that they have the exclusive right to the use of the name 'Webster' in the title of dictionaries" (149 Fed. 858, 864). On appeal the language of the Circuit Court of Appeals was: "The Merriam Company should be enjoined from sending out circulars to the effect that it has the exclusive right to use the name 'Webster' in connection with dictionaries" (159 Fed. 638, 640). The decree as actually entered is as follows: "That a perpetual injunction issue in this suit restraining the defendant, the G. & C. Merriam Company, its officers, agents, attorneys, and servants, and all others claiming or holding through or under it, from publishing or issuing circulars, advertisements, or notices stating in form or effect, or in any manner claiming, that it, the defendant, or any other person, firm or corporation claiming under or through it, has exclusive right to the use of the name 'Webster' in the title of dictionaries. That a perpetual injunction issue in this suit, restraining the cross-defendant, George W. Ogilvie, his agents, attorneys, servants, employees, and all persons claiming or holding through or under him, from using as the name or title of his said dictionaries, described in the amended cross-bill herein, to which this litigation relates, the words, 'Webster's Dictionary,' or 'Webster's Imperial Dictionary,' or 'Webster's Universal Dictionary,' or any equivalent thereto, upon the titlepage, or upon the back or cover of said dictionaries, or in any advertisement, circular, notice, or announcement referring to said dictionaries, unless

(1) Complainant was not enjoined in that case from filing bills in equity for relief against fraudulent competition by a misuse and abuse of the name Webster; such a cross-bill was maintained in that very case, which awarded relief to cross-complainant. (2) It was adjudged to be illegal for complainant to *circularize* Ogilvie's customers with a claim of exclusive right to the word Webster in the title of dictionaries. But complainant has not done that in this case, and although it was *only circularizing* which was enjoined, not the bringing of suits, even this suit does not claim such an exclusive right. The bill claims relief against only a false and fraudulent use of the name Webster upon a particular book in which it is supported by the Ogilvie decision. (3) Again there is no privity between defendant and Ogilvie, and that decree is not *res judicata* between these parties.¹ (4) The demand that defendant quit using the name Webster's upon this particular book, the British Empire, or Crown

accompanied by the following statement, plainly printed upon the title-page, and in each said advertisement, circular, notice or announcement, namely: "This dictionary is not published by the original publishers of Webster's Dictionary, or by their successors"—and especially from publishing or issuing in their present form the title-pages and backs of his said dictionaries and the circulars and advertisements in this suit adjudged misleading or deceptive, or in any other form of title-page, back, circular, or advertisement that is in any way calculated to deceive purchasers into purchasing complainant's dictionary under the belief that it is a Webster's dictionary published by the G. & C. Merriam Company." This decree is quoted and construed in *Merriam v. Saalfeld*, 190 Fed. 927, 931.

¹Defendant herein pleaded in its answer the Ogilvie decree, but the Court below expunged it as impertinent, because not *res judicata* between these parties, and refused leave to defendant to file a cross-bill setting it up, for the same reason, and because the bill did not claim an exclusive right in the word "Webster" *simpliciter* (Opinion of Hough, J., on motions, Jan. 23, 1912, unreported).

Dictionary because it is wholly false and fraudulent in that connection, is not an "illegal claim of a monopoly in the name". (5) The decision that Ogilvie was entitled to call his book "Webster's", provided he used an explanatory suffix, because it was revised directly and actually from the 1847 Webster, does not decide that this defendant may import a British dictionary of different name and ancestry, and deceptively rename it Webster's. Complainant has not been forbidden in the first, or any other, Circuit, from suing to enjoin such a palpable fraud. There is no vestige of impropriety in this suit. Yet the court below, upon the theory of some such impropriety, denied complainant even the relief to which the court conceded it was otherwise entitled.

The statement in the opinion that complainant "cannot object that the public is buying as a modern Webster substantially the old Crown Dictionary",

is confidently challenged. Repeated injunctions in almost those express words have been granted to complainant in contested cases.¹ It is insisted that com-

¹In *Merriam v. Texas Siftings Pub. Co.* (49 Fed. 944), the final injunction restrained the defendant from all acts "which tend to misrepresent the character of the edition of Webster's Dictionary offered for sale by defendant, and to mislead the public into the belief that it is a reproduction of a modern edition of that work which is manufactured and sold by the complainants, . . . and from the sale and delivery of any of said books without placing in each of the books so sold and delivered, upon a printed slip attached to the title-page thereof, a notice that it is a reprint of the edition of 1847, together with a list of the additions that have been made thereto and which the book contains." (Writ dated April 5, 1892.) Identical or closely similar language was used in the final decrees in: *Merriam v. Famous etc. Co.* (47 Fed. 411); *Merriam v. T. H. Robinson Stationery Co.* (Northern District of Texas, Feb. 24, 1891, unreported); *Merriam v. Adams* (S. D. of N. Y., Dec. 2, 1892, unreported).

plainant may object that defendant's old Crown or British Empire Dictionary is being sold as a "modern Webster", because that passes it off as complainant's product and thus invades complainant's trade and good-will. Complainant has a special interest or property right in the "secondary meaning" of the name Webster,¹ if not in the name itself, and complainant is entitled to complain of the special injury resulting to it from defendant's fraud on the public. As Mr. Justice Holmes said in the *Van Den Berg* case (226 U. S. 452):—

"Imposition on the public is not a ground on which the plaintiff can come into court."

But when the imposition consists in imposing upon the public the defendant's goods as and for the complainant's goods by a false use of a name, as in this case, the complainant may object and obtain relief. The distinction is very clearly pointed out by Mr. Justice Day in the "*Aluminum Wash Board*" case (*American Washboard Co. v. Saginaw Mfg. Co.*, [C. C. A. 6th Cir.] 103 Fed., at pp. 284, 285). The case at bar comes squarely within the rules there stated.

An injunction should have been granted restraining defendant's false use of the name "Webster's", and, in any event, the deceptive manner of using it, and the fraudulent advertisements, should have been enjoined.

¹"Such secondary signification, when established, is the subject matter of exclusive right." *Chickering v. Chickering* (C. C. A., 7th Cir.), 215 Fed. 490. "Others may use the common word in its common meaning, but they cannot use it in the particular meaning created by the complainant." *Hanover Star Milling Co. v. Allen* (C. C. A., 7th Cir.), 208 Fed. 513, 517.

"Whether it is the name of a former (but no longer) patented article, or is the title of a book with expired copyright, it has become the maker's or the publisher's token and differs from a technical common law trade-mark mainly, if not wholly, in the fact that the proprietor's right is not of absolute but of qualified exclusion." *Merriam v. Saalfeld*, 198 Fed. 375.

V.

DEFENDANT CANNOT JUSTIFY ITS USE OF THE NAME "WEBSTER'S" BY ASSERTING THE EXPIRATION OF COPYRIGHT UPON THE 1847 EDITION, BECAUSE: (1) DEFENDANT DOES NOT PUBLISH THE EXPIRED EDITION, OR EVEN A REVISION OF IT; AND (2) THE TITLE AND GENERIC NAME OF THE EXPIRED BOOK IS "AN AMERICAN DICTIONARY",—NOT "WEBSTER'S DICTIONARY."

(1) *Expiration of early copyrights no defense.*

It is immaterial and futile for defendant to say that the copyright has expired upon the 1847 edition of Webster's Dictionary. Defendant does not issue or use that edition. It does not avail itself of the dedicated property. It does not use the name in its primary descriptive and public sense, in which alone it is entitled to use it, or could have any honest need for using it. Its book is a copy of the British Empire, or Crown Dictionary, and not a revised or abridged edition of the 1847 Webster (see point III, *ante*, pp. 64 *et seq.*). No rule of law, and no decided case supports defendant's application of the name Webster to such a book.

The early "*Webster's Dictionary Cases*"¹ held that

¹*Merriam v. Texas Siftings Pub. Co.*, 49 Fed. 944; *Merriam v. Famous, etc., Co.*, 47 Fed. 411; *Merriam v. Holloway Pub. Co.*, 43 Fed. 450. It was in this last case that, in overruling the claim then made of an absolutely exclusive trade-mark right in the words "Webster's Dictionary" preventing their use even in connection with a reprint or republication of photolithographic copies of editions on which the copyright had expired, that Mr. Justice Miller characterized this extreme claim as nonsense, and yet this word was again and again cited in defendant's brief as if the Court had then said that the Merriams' claim to be protected against unfair and fraudulent competition in the use of the title or name "Webster's Dictionary" was all nonsense. The contrary was adjudged and a demurrer to the bill was overruled.

the expiration of copyright on the 1847 edition of Webster's Dictionary authorized any one to republish that dictionary under that name, provided such reprints were not misrepresented or passed off as and for the modern "Webster's Dictionary" then being published by complainant.¹ The later "*Webster's Dictionary* cases"² held that revised or abridged editions, actually and honestly revised or abridged from the expired book

¹Mr. Justice Miller said in the *Holloway* case, *supra*: "Taking all of these allegations together, there may be some evidence of a fraudulent intent on defendants' part to get the benefit of the reputation of the edition of Webster's Dictionary which the complainants are publishing, and it may possibly be that, in consequence of the facts averred, the public are deceived, and that the complainants are damaged to some extent." Judge Thayer said in the *Famous* case, *supra*: "In view of these features of the bill, and the allegation that many people have been induced to buy copies of the 'Famous Reprint' in the belief that they were copies of the edition of 1864 of Webster's Dictionary, and in view of the averment that the reputation of complainants' dictionary, which they have been at great trouble and expense to prepare and improve, has been thereby greatly damaged, and the sales thereof largely decreased, I must conclude that, on the showing made, complainants are entitled to some form of equitable relief. If it be true that, by the means described in the bill, the public have been deceived, and the complainants have sustained damage, then the defendant has no right to suppress in the reprinted work all parts of the original publication which would show that defendant's book is merely a reproduction of an old edition of Webster's Dictionary, and at the same time make representations to the public, that are liable to be construed as an assertion on the part of defendant that its cheap edition of the dictionary is the same book which complainants are publishing and selling." This decision was followed by Judge Shipman in the *Texas Siftings* case, *supra*.

²*Merriam v. Saalfeld* (C. C. A., 6th Cir. 1912), 198 Fed. 369, 190 Fed. 927; *Merriam v. Ogilvie* (C. C. A., 1st Cir. 1908), 170 Fed. 167, 159 Fed. 638, 149 Fed. 858; *Merriam v. Straus*, 136 Fed. 477.

could describe themselves as such,¹ and use the name, provided an adequate explanation accompanied the name so as to cut out the secondary meaning. All the cases from the beginning held that no one has a right to use the name so as to get the benefit of the reputation of complainant's later editions.

—*Doctrine of the "Singer" cases.*

The defendant invokes and relies upon the doctrine of the "*Singer*" cases² in this court, as applicable to its publication. The statement of this doctrine, as summarized and formulated in the opinion of Mr. Justice White, is quoted below.³ This doctrine has

¹It cannot, perhaps, be too often repeated or emphasized that it was not contended in the cases below on behalf of the complainant that Webster's original publications or any subsequent publications of which the copyright has expired may not be now reprinted and republished by any one. They are concededly public property. But it was and is contended that an essentially different and unaltered book ought not to be now published under the same title as the original publication, and certainly not when accompanied by the business methods adopted by the defendant in an unfair competition with complainant. The complainant has never even remotely denied "that any honest compilation or abridgment at the present time of Webster's work is entitled to describe itself as such" (*supra*, III, 823). But it is contended that such a compilation as the "*Crown*" or "*British Empire*" is not an honest compilation at the present time of Webster's work and that in any event it is not entitled to masquerade as the Webster's Dictionary as now known to the public.

²*Singer Mfg. Co. v. Jané Mfg. Co.*, 153 U. S. 169; *Singer Mfg. Co. v. East*, 153 U. S. 205.

³"That where, during the life of a monopoly created by a patent, a name, whether it be arbitrary or be that of the inventor, has become, by his consent, either express or tacit, the identifying and generic name of the thing patented, this name passes to the public with the cessation of the monopoly which the patent created. Where another avails himself of this public designation, to make the machine, and use the generic designation, he can do so in all forms, with the fullest liberty, by affixing such name

been universally accepted and followed. Complaints are confidently relied upon this decision as a conclusive authority in its favor. There exists a remarkable analogy in many of the facts. This court very plainly said that the only right of the defendant to use the name "Singer" upon sewing machines was in connection with machines made in accordance with the original Singer patents, and of the type or character of which Singer had become the generic name. Subsequent cases have so construed and applied it,¹ and when other users of the name sought to apply it to machines not made in accordance with the Singer patents, they were promptly and absolutely enjoined.²

As the machines, by referring to it in advertisements, and by other means, adapted, however, to the condition that the name must be so used as not to deceive others of their rights, or to deceive the public; and, therefore, that the name must be accompanied with such indication that the thing designated is the work of the one making it, so will necessarily affect the public of that fact.³ (17 C. S. 66.)

Philosophy Comp. Co. v. Philopoley et al., 10 C. S. 473, 1 S. 100; *Jaffe v. Evans*, 75 App. Div. (N. Y.) 109 (1st District); *Conover Co. v. Southern* (E. E. A.), 10 Fed. App. 900 (Circuit); *Conover Co. v. Manchester* (E. E. A.), 10 Fed. App. 122; *Conover Co. v. Kellenger*, 10 Fed. App. 727.

Singer Mfg. Co. v. Hight, 100 Fed. App. 109, where Circuit Judge Taft granted an absolute injunction because the sewing machine sold by the defendant was not in fact a "Singer". After discussing the decision of the Supreme Court, the learned judge continued as follows (at p. 122): "It declares the defendant's article was in fact a 'Singer' machine, the work of a liberty to so designate it, provided the article itself was unambiguously specified that it was not the product of the Singer Company; but the sentence, as I view it, is against the very main point, and therefore the means of making such use is prohibited. The machine itself did not upon the market as not a 'Singer'. That word is not in a sense that it is not necessary or appropriate. Nor can I see in the contention that the machine is a 'Singer' type which it was long has been known as the 'Domestic'. Consequently the defendant's employment of

So here, defendant has applied the name of the American "Webster's Dictionary" to an unrelated British dictionary. Nothing in the *Singer* case affords any warrant for such conduct and justification, if any is possible, must be sought elsewhere.

The principle of the *Singer* cases was involved in *Jacobs v. Beecham*, 221 U. S. 263, where the defendant was enjoined from selling as "Beecham's Pills", a preparation which was not "Beecham's Pills", because not made in accordance with plaintiff's secret formula. So in *Baglin v. Cusenier*, 221 U. S. 580, the name "Chartreuse" was enjoined as the name of a liqueur not made in accordance with the secret formula of the French monks, and therefore not in truth "Chartreuse".

The doctrine of the *Singer* cases (163 U. S. 169 and 205) was the doctrine applied in the three early *Webster* dictionary cases (43 Fed. 450; 47 Fed. 411; 49 Fed. 944), which are quoted and applied. During the life of a patent or copyright, the name of the article or book is the generic name of the thing and is not a trade-mark, because it is descriptive of the thing. It may, therefore, be used by any one, even during the life of the patent or the copyright, who deals in that specific thing, because that is making a truthful use of the name. *Johnson v. Seaman* (C.C.A.), 108 Fed. 951; *Vitascope v. U. S. Phonograph Co.*, 83 Fed. 30. But although the name of a copyrighted book or patented article is not a trade-mark, no one may apply that name to a different competing article or book of

the word 'Singer' can have but one result, and that is, not to correctly identify the thing itself, but to mislead the public as to its source of origin; and, this being so, the decision in *Singer Mfg. Co. v. June Mfg. Co.* does not support, but subverts, her present position."

the same general kind, because this would be a false description tending to pass off such different goods as being the patented article or copyrighted book. *Shook v. Wood*, 10 Phil. (Pa.) 373; *Janney v. Pancoast Ventilator Mfg. Co.*, 128 Fed. 121; *Adam v. Folger*, 120 Fed. 260; *Hoffman v. B. Kuppenheimer*, 183 Fed. 597; *In re Palmer's Trade-Mark*, L. R., 24 Ch. Div. 504. The only effect of the expiration of the copyright or the patent is to enable every one to make the genuine article, and if he does make such article, he may call it by the generic name by which alone it has always been known. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169; *Holzappels Co. v. Rathjen's Co.*, 183 U. S. 12; *Merriam v. Famous, etc.*, 47 Fed. 411; *Merriam v. Texas Siftings Co.*, 49 Fed. 944; *Merriam v. Holloway*, 43 Fed. 450. If, however, long use during the statutory monopoly or afterwards has given the name the secondary meaning indicating that all goods bearing that name are the product of the original proprietor, the subsequent maker of the goods and user of the name must accompany the name with an explanatory statement adequate unmistakably to distinguish the goods. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169; *Ludlow Valve Mfg. Co. v. Pittsburgh Mfg. Co.* (C. C. A.), 166 Fed. 26. Neither a patent nor a copyright confers any exclusive right to any particular name, but only confers the exclusive right to make and sell the article or book to which that name is applied. *Centaur v. Heinsfurter*, 84 Fed. 956, per Mr. Justice Brewer; *Atlas Mfg. Co. v. Street* (C. C. A.), 204 Fed. 398; *Harper v. Ranous*, 67 Fed. 904, per Lacombe, J.; *Corbett v. Purdy*, 80 Fed. 901. The name is just as much generically descriptive, and *publici juris*, during the life of the monopoly as afterwards.

The only reason why others may not use the name before expiration of the copyright or patent is because they cannot use it truthfully. The only reason why others may use the name after expiration of copyright or patent is because they may and do use it truthfully. If they do not use it truthfully, either before or after expiration of the statutory monopoly, they may not use it at all in a competitive business, where it would be a false token. *Atlas Mfg. Co. v. Street* (C. C. A.), 204 Fed. 398; *Black v. Ehrlic*, 44 Fed. 793. Of course, there is never any property *in gross* in a mere name or mark,—not even in a technical trade-mark. It is only the right to use it in a particular connection that may be owned. *Hanover Star Mills Co. v. Allen*, 208 Fed. 573, 576. And only a like right can be dedicated.

In the latest Webster Dictionary case, *Merriam v. Saalfeld* (C. C. A., 6th Cir., 1912), 198 Fed. 369, 374, Denison, C. J., used this language.

"The situation arising under an expired patent or copyright cannot be differentiated from that arising with reference to any other descriptive word. There can be no trade-mark or similar exclusive right in what has been, during the life of the patent or copyright, the name of the patented article or copyrighted book, not because of any particular rule of trade-mark or patent law, but because the word, during the term of the monopoly, has come to be a word of apt description. It has come to be the name of the thing, and hence anyone who later makes the thing may call it by its true name. Neither is there anything peculiar in the application of the secondary meaning theory to this class of cases. It is to be applied just as with reference to any descriptive word, and if, after the word comes into existence and becomes free to the public as the name of the thing, it is

used by one manufacturer so long and so exclusively that it comes to be, to that part of the public, indicative that it is his product, he is entitled to protection for the same reasons, in the same way and to the same extent as held with reference to 'Camel's Hair Belting' (*Raddaway v. Benham*, App. Cas., 1896, p. 199), 'Glenfield Starch' (*Wotherspoon v. Currie*, L. R., 5 H. L. 508), 'Elgin' or 'Waltham' watches (*Elgin Co. v. Illinois Co.*, *supra*; *Am. Watch Co. v. U. S. Watch Co.*, 173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826, 73 Am. St. Rep. 263), or 'Hall's safes' (*Herring, etc., Co. v. Hall, etc., Co.*, 208 U. S. 554, 28 Sup. Ct. 350, 52 L. Ed. 616).

"Exactly so, and of necessity, with regard to this copyrighted book. . . . Whether it is the name of a formerly (but no longer) patented article, or is the title of a book with expired copyright, it has become the maker's or the publisher's token, and differs from a technical common-law trade-mark mainly, if not wholly, in the fact that the proprietor's right is not of absolute, but of qualified, exclusion."

Other cases support the view that the expiration of a patent or copyright does not authorize the use of the name of the patented or copyrighted article as the name of another and substantially different competing article, and that such use constitutes unfair competition which will be enjoined. "*Chatter-box cases*," 21 Fed. 189; 27 Fed. 23; 31 Fed. 154 (uncopyrighted books); *Thomas v. Lennon*, 14 Fed. 849 (uncopyrighted opera); *Metzler v. Wood*, 8 Ch. Div. 606 (uncopyrighted book).

In the *Ogilvie* case, 149 Fed. 858, (C. C. A.) 159 Fed. 638, it was held that the expiration of copyright upon the 1847 edition of Webster's Dictionary authorized anyone to publish a revised edition of that book

under the name of Webster's Dictionary, provided an explanatory statement accompanied such use of the name. This was placed upon the assumed doctrine of the *Singer* case which was deemed controlling. But this decision does not aid defendant here both because its book is not a revision of Webster's Dictionary, and because it has used the name without any explanatory notice. Ogilvie's book was a direct revision of the 1847 edition of Webster's Dictionary, and approximately one-half of it was shown to have been reproduced word for word from the printed Webster page.

In *Dicks v. Yates*, 50 L. J. Ch. N. S. 809, 815, Lord Justice James, distinguishing unfair competition in books from infringement of copyright, said:

"There is another mode which, to my mind, is wholly irrespective of, and anterior to, any copyright legislation, and that is where a man is selling a work under the name or title of another man or another man's work. That is not invasion of copyright. It is a common law fraud. It is to be redressed, and is capable of being redressed, by ordinary common law remedies, wholly irrespective of any of the conditions or restrictions imposed by the Copyright Acts. Suppose a man were to publish a book of cookery, calling it as 'Soyer's Cookery Book', which it is not; or of arithmetic, as 'Colenso's Arithmetic,' which it is not; or 'Hemy's Pianoforte Tutor' (as in the case of *Metzler v. Wood*, before the Court of Appeal), which it is not;—that is a common law fraud."

(2) "*Webster's Dictionary*" Not The Title of Book with Expired Copyright.

As a matter of fact the words "*An American Dictionary*" and not the words "*Webster's Dictionary*"

were the generic name of the 1847 edition, and prior editions, upon which the copyright has expired.¹

This book was copyrighted under the name of "An American Dictionary," which name was duly registered in the Copyright Office.² Contracts conveying the copyright of this book conveyed it by the name of "An American Dictionary."³

Under the copyright law every copyrighted book is known by an official title, which title must be recorded in the Copyright Office, and must appear upon the title page of every copy. That official recorded title is the generic name and description of that particular book by which it is identified, and upon expiration of the copyright, that is the name or title which is dedicated to the public together with the book which it describes.

A wide distinction exists in this regard between copyrighted books and patented articles. A copyrighted book must bear an official title by which the book copyrighted may always be known and described. Patented articles, upon the other hand, are not given any official name, but acquire a market name by common acceptation and user, and are only known and described by the name thus acquired.

The dedication of literary works by publication is wholly a creature of the copyright statute. The common law copyright was perpetual. The copyright statutes are, therefore, in so far as they work a dedication, in derogation of the common law, and are to be

¹See *1847 Edition Filed as Exhibit*. See also *Title Pages, etc.*, *Rec. vol. I*, pp. 671, *et seq.*

Peck, Rec. vol. III, p. 1597, fol. 6386.

²See *Copyright Certificates, Rec. vol. I*, pp. 730, 731.

³*Early Contracts & Assignments, Rec. vol. I*, pp. 783, *et seq.*

strictly construed. It is fair to hold that, upon the expiration of the copyright, the right to publish the book and to call it *by the name under which it was copyrighted* becomes public property. But no good purpose is subserved by holding that distinguishing marks or names placed upon the outside cover likewise become public property, and it has never been so held.¹ The copyright law does not deal in any way with the outside cover of books. Its provisions in regard to the title relate only to the title page. Names and marks upon the cover are not protected by the copyright law. Then how can such names or marks be dedicated to the public by expiration of the copyright? To hold that they are so dedicated, extends the statute by mere construction to matters as to which it makes no provision whatever.

Defendant is invoking an assumed technical rule of law to permit it to perpetrate a fraud. Equity will keep it strictly within the legal rule, and will be equally technical in order to prevent a fraud.

It is true that the three early *Webster Dictionary* cases held that the words "Webster's Dictionary" became public property with the expiration of the copyright upon the 1847 edition. But this holding was based upon a *mistake of fact*, Judge Thayer expressly saying that the name "Webster's Dictionary" appeared upon the title page (47 Fed. p. 413). As this was not the fact, and it was the words "An American Dictionary" which appeared upon the title page, it is the latter

¹Distinctive names, labels and marks used upon patented articles do not become free to the public upon expiration of the patent. *Singer Mfg. Co. v. Bent*, 163 U. S. 206; *Batcheller v. Thompson* (C. C. A.), 93 Fed. 660; *Centaur v. Neathery* (C. C. A.), 91 Fed. 891; *Hiram Hoit Co. v. Wadsworth*, 41 Fed. 34.

title, and not the former, which became public property along with the rest of the work.¹ The words "Webster Dictionary" appeared merely upon the cover and were the technical trade-mark or trade-name for complainant's and its predecessors' entire series of dictionaries.

If, however, it should be held that by complainant's acquiescence, and by public understanding and user, the words "Webster's Dictionary" became the generic name of the 1847 edition, then *by the same token those words remained the generic name of the 1847 edition only so long as such understanding and user continued*. It ceased more than forty-two years ago. For more than forty-two years "Webster's Dictionary," by public understanding and user, has been the name of a substantially different book, to wit, first, the edition of 1864 with its supplements, and abridgments, and now the later current editions. "Webster's International Dictionary," is the registered copyright title of complainant's edition of 1890, and subsequent years, and the name "Webster's" appears in the registered copyright titles of all complainants abridgments. These copyrights have not expired. Both by law and by public understanding and user, "Webster's Dictionary" is the generic name only of complainant's present books. When the copyrights thereon expires, all the world may publish and sell them by that name. But so long as they are published and sold and known

¹Attention is called to a manifest error in the *Ogilvie* and *Saalfeld* decisions, consisting in a statement that *the name* "Webster's Dictionary" had been copyrighted and that the copyright upon the name had expired. *Ogilvie* case, 159 Fed. 640; *Saalfeld* case, 190 Fed. 929. As a matter of fact that name had not been copyrighted, or even registered as a title, and as a matter of law, mere names cannot be copyrighted.

in the market by that name, no person is entitled to sell another and different book by that name, and thus appropriate to himself the good will and reputation of complainant's books.

VI.

SECONDARY MEANING NAMES ARE PROTECTED BY AN ABSOLUTE FORM OF INJUNCTION AGAINST A FALSE OR UNNECESSARY MANNER OF USE, AND IN OTHER CASES BY A QUALIFIED INJUNCTION REQUIRING AN ADEQUATE EXPLANATION TO ACCOMPANY THE NAME.

The degree of restraint in any particular case is always commensurate with the necessities of the situation and what commercial morality and fair business dealing may dictate. It depends upon "the exact nature of the injury and the causes that mislead the public"¹ In reconciling the rights of the parties in cases of this kind² so as to permit the defendant to make every proper and honest use of a common term, and at the same time to prevent a misuse of the term unduly and unnecessarily damaging to the prior trader, who first gave the name a value and a significance in the trade, the courts have formulated certain rules which safeguard complainant's rights and yet work no hardship to an honest defendant.³ These rules merely express and enforce the general principle expressed by the aphorism "*sic utere tuo ut alienum non lædas.*" *Singer Co. v. June, etc., Co.* 163 U. S. 169.

¹Per Thayer, J., in *Merriam v. Famous, etc., Co.*, 47 Fed. 415.

²*Rowley v. J. F. Rowley Co.* (C. C. A.), 161 Fed. 94.

³Per Lacombe, J., in *Allegretti, etc., Co. v. Keller*, 85 Fed. 643, citing *Baker v. Sanders* (C. C. A.), 80 Fed. 895.

The principal rules applied in this class of cases are:—

(a) *The name must be truthful in some sense as applied to defendant's goods; a false use will be absolutely enjoined.*

Thus personal names are not subject to exclusive appropriation *as against persons of the same name*; but as against persons not of that name (except legitimate successors by assignment), the right to use personal names which have acquired a secondary meaning is exclusive, and will be protected by an unqualified form of injunction.¹ *L. E. Waterman Pen Co. v. Modern Pen Co.*, 35 Sup Ct. Rep. 91 (No. 54 Oct. Term, 1914. Not yet officially reported); *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118; *Brown Chemical Co. v. Meyer*, 139 U. S. 540; *International Silver Co. v. W. H. Rogers Corp.*, 67 N. J. Eq. 646; *Pinet v. Maison Pinet*, 14 Rep. Pat. Cas. 933, 15 Rep. Pat. Cas. 65; *Royal Baking Powder Co. v. Royal*, (C. C. A.) 122 Fed. 337, 343, wherein Mr. Justice Lurton said:

"If the defendant did not bear the family name of 'Royal' there would not be the slightest doubt but that his use of the word 'Royal' in connection with baking powder made and sold by himself *would be absolutely prohibited* upon the ground that the use of so arbitrary and

¹"The general rule and the restrictions upon it are thus stated in *Brown Chemical Co. v. Meyer* [139 U. S. 540]. . . . An ordinary surname cannot be appropriated as a trademark by any one *as against others of the same name who are using it for a legitimate purpose*; although cases are not wanting of injunctions to restrain the use even of one's own name, where a fraud upon another is manifestly intended. . . . If such use be a reasonable, honest, and fair exercise of such right," [he is not liable for incidental damage]. *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118.

meaningless a word applied to a baking powder could only be with the dishonest intent to appropriate to himself some of the benefits resulting from the demand for the Royal Baking Powder made and sold by the complainant."

The question suggested, and left unanswered by this court in the *Waterman Pen* case, whether the protection granted in personal name cases "is limited by reason of a personal privilege, or is the measure of the plaintiff's rights as against the world," has been answered by the Circuit Court of Appeals for the Sixth Circuit as follows:

"The cases relied on by appellees upon this subject do not secure more than a personal privilege, and that only when it is exercised fairly and so as not to mislead the public."¹

Of course, the right to use personal names may be assigned in connection with the business in which they have been used, and if such assignment is *bona fide* and not a sham, the assignee will be protected in his use of the assigned name as though it were his own. *L. E. Waterman Co. v. Modern Pen Co.*, 35 Sup. Ct. Rep. 91 (not officially reported); *Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U. S. 267; *Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.*, 208 U. S. 554.

Likewise geographical or place names may not be exclusively appropriated as against others located at, or dealing in goods coming from, the place indicated, and therefore using it with equal truth. But such names may be exclusively appropriated as against everyone not doing business at the place designated by the name. *La Republique Francais v. Saratoga Vichy*

¹*National Distilling Co. v. Century, etc., Co. (C. C. A.)*, 183 Fed. 206.

Spring Co., 191 U. S. 427, where Mr. Justice Brown stated the rule:

"Geographical names often acquire a secondary signification indicative not only of the place of manufacture or production, but of the name of the manufacturer or producer and the excellence of the thing manufactured or produced, *which enables the owner to assert an exclusive right to such name as against every one not doing business within the same geographical limits*; and even as against them, if the name be used fraudulently for the purpose of misleading buyers as to the actual origin of the thing produced, or of palming off the productions of one person as those of another."¹

¹Citing: *Elgin Nat. Watch Co. v. Illinois Watch Co.*, 179 U. S. 665; *Newman v. Alvord*, 51 N. Y. 189; *Lee v. Haley*, L. R. 5 Ch. App. 155; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Braham v. Beachim*, L. R. 7 Ch. Div. 848; *Thompson v. Montgomery*, L. R. 41 Ch. Div. 35; *Seixo v. Provezende*, L. R. 1 Ch. App. 192.

"It is abundantly settled by authority in the Federal Courts that they will not tolerate a false use of a geographical name, when it is so used to promote unfair competition and to induce the sale of spurious goods." *Collingsplatt v. Finlayson*, 88 Fed. 693, wherein the words "Plymouth Gin" on goods not coming from Plymouth were absolutely enjoined.

See also *American Washboard Co. v. Saginaw Mfg. Co.* (C. C. A., 6th Cir.), 103 Fed. 281, where Mr. Justice Day said: "An examination of these cases shows that they are based upon the doctrine which we have already shown to be the basis of equitable interference. See *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 30 C. C. A. 386, 86 Fed. 608, and cases therein cited. The doctrine is well stated in the syllabus of the case of *Gage-Downs Co. v. Featherbone Corset Co.* (C. C.), 83 Fed. 213: 'One making corset waists at Chicago, and selling them as "Chicago Waists," so that this designation has come to denote among purchasers the goods made by him, is entitled to an injunction against another who makes similar waists in a different state and city, and sells them as "Chicago Waists," with the manifest intent of availing himself of the reputation acquired by the other's goods.' " [Decision by Severens, J.]

In *Newman v. Alvord*, 51 N. Y. 189, cited in support of the above quoted rule, plaintiff's cement made at Akron had become known as "Akron Cement." Defendant called his cement, made near Syracuse, "Alvord's Onondaga Akron Cement or Water Lime, manufactured at Syracuse, N. Y." An absolute injunction against this use by defendant of the name "Akron" was granted. This case was also cited with approval by this court in *Conal Co. v. Clark*, 13 Wall. (U. S.) 311, where the court said:

"It was not in fact Akron cement (for Akron and Syracuse were a long distance from each other), and the purpose of calling it such was evidently to induce the public to believe that it was the article made by the plaintiffs. The act of the defendants was, therefore, an attempted fraud, and they were restrained from applying the word 'Akron' to their manufacture. But the case does not rule that any other manufacturer at Akron might not have called his product 'Akron Cement' or 'Akron Water Lime.'"

In distinguishing the "*Amulie*" liquor case, this court further said (13 Wall. loc. cit. 305):—

"It does not appear from the report of the case that the juice or tonic from which the defendant's article was made came from Amulie. If not, their mark was false. Of course the Lord Chancellor enjoined them."

In *Elgin National Watch Co. v. Illinois Watch Co.*, 179 U. S. 665, the Court said:—

"Obviously to hold that appellants had obtained the exclusive right to use the name 'Elgin' would be to disregard the doctrine authorized by *Mr. Justice Strong in Conal Co. v. Clark*, as sound doctrine 'that no one can apply the name of a district of country to a well known article of commerce and obtain thereby

such an exclusive right to the application as to prevent others imitating the design or having in similar articles coming from the district *fraudulently using the same designation*.¹

"But whereas an alleged trade-mark is not in itself a good trade-mark, on the use of the mark the same is deemed the particular manifestation or symbol, relied against unfair competition and to be avoided by requiring the use of the mark by another to be confined to its primary sense by such limitation as will prevent misapprehension on the question of origin."²

The Supreme Court further said:

"These and the cases to and outside the proposition that words which in their primary signification give notice of a general fact, and may be used for that purpose by every one, are lawfully withdrawn from common use as the same, but they illustrate the necessity of the protection from imitation and fraud in respect of a secondary signification afforded by the courts."³

Obviously this doctrine limits any use by others of a word with a secondary meaning to a fraudulently descriptive use as to its primary sense.

The same rule applies to the generic names of articles such as "Singer Sewing Machine,"⁴ "Mergler's Composition,"⁵ "Hochman's Pills,"⁶ "Chatterbox,"⁷ "Castor,"⁸ "Laudanum,"⁹ "Lafley's Extract,"¹⁰ and

¹ *Singer Mfg. Co. v. Jané Mfg. Co.*, 103 U. S. 267, 269; *Singer Mfg. Co. v. Hoff*, 100 U. S. 157.

² *Mergler's Composition Co. v. Mergler's American Compositions Co.*, 103 U. S. 157, 159.

³ *Hochman & Hochman*, 22 U. S. 285.

⁴ *Hoff v. Casner*, 100 U. S. 277, 280.

⁵ *Chatterbox Co. v. Webster*, 10 U. S. 51, 52; 30 Feb. Rep. Circuit, 10 U. S. 110; 100 U. S. 157, 159.

⁶ *Hoff v. Hoff*, 100 U. S. 157, 159.

⁷ *Lafley's Extract of Dates Co. v. Lafley's Extract Co.* (U. S. 51), 100 U. S. 157, 159.

"Bromo-Caffeine."¹ Subsequent traders may deal in these articles and use these names to designate such articles. But when they do not deal in these articles, and seek to apply these names to spurious imitations, the original proprietor is entitled to an absolute injunction against such untruthful use, which is unnecessarily injurious, fraudulent, and therefore not *damnum absque injuria*.

Book titles are protected by injunction against use or imitation as the title of other similar competitive books. A mere book title is not a trade-mark because it is the generic name of the particular book to which it has been applied. But irrespective of this fact, and irrespective of whether or not the book is copyrighted, an injunction will be granted against a use of its name as the name of a different competitive book, upon the ground of unfair competition and in order to prevent deception. "*Chatterbox Cases*," 21 Fed. 189; 27 Fed. 22; 29 Fed. 91; 31 Fed. 154; *Merriam v. Saalfield*, 198 Fed. 369; *Merriam v. Oglivie*, 149 Fed. 858; 159 Fed. 638; 170 Fed. 167; *Oxford University v. Wilmore-Andrews Pub. Co.* 101 Fed. 443; *Harper v. Holman*, 84 Fed. 224; *Social Register Assn. v. Howard*, 60 Fed. 270; *Harper v. Lare*, 103 Fed. 203; *Metzler v. Wood*, 8 Ch. Div. 606; 47 L. J. Ch. 625; *Dicks v. Yeates*, 50 L. J. Ch. 809.

Truth, and some reasonable need for an honest purpose, is the only possible justification for any use of a confusing name by a newcomer into the market. No trade pirate has ever attempted to appropriate the trade rights of another without at least some colorable and alleged truthful reason for using the terms sought to be appropriated. The only reason why geographical

¹*Keasby v. Brooklyn Chemical Works*, 142 N. Y. 467.

words or words of quality may not be exclusively appropriated is that such words are or may be aptly descriptive, and the only reason why a trespassing defendant has the right to use such words at all is because, in the primary or original sense, the word is descriptive, and he is entitled to use it in that sense. Therefore, where the defendant is using such a word, which has acquired a secondary meaning, in a truthfully descriptive sense, he may not be absolutely enjoined but may be required to accompany such use with other explanatory words sufficient to prevent deception and resulting fraud. Where, however, the defendant has no need to use the word because it is in no sense truthfully descriptive of his product, he may and will be absolutely enjoined from using it, because then his only possible purpose in using it is to commit a fraud, and he is in no way harmed, or his rights limited, by being prevented from using a false description solely with the intent and with the effect of passing his goods off as those of the complainant. The decisions are unanimous to this effect. It is illogical to first permit a defendant with fraudulent intent, and without any justification in necessity or truthful description, to do everything necessary to commit a fraud on the complainant, and then, as a condition of such permission to require him to use a sentence contradicting his fraudulent assertions, which may, or may not, be a sufficient antidote.

"The defendant had no right to do that which rendered these distinctions necessary, and which also rendered them futile." *Moxie v. Daoust* (C. C. A. 1st Cir.), 206 Fed. 434.

(b) *Where the name is truthfully descriptive of defendant's goods, in some sense of the term, it must be used only in a descriptive manner, and so as to con-*

vey such truthful sense and no more; use as the identifying title, or short or market name of the goods will be enjoined.

Obviously, where a certain word or phrase has become the short name or market title of one person's goods, the use of the same short name for the similar goods of a rival trader is necessarily deceptive.

"Unless you can defend yourself on the ground that what you are selling is the thing that acquired the name, what possible ground can you have for saying that you are not passing off your thing as his, when you are giving it the name which his goods have borne up to that date?"¹

Therefore, in regulating a defendant's use of such words, equity will not permit him to use them in such a way as to make them also the identifying title or name of his goods,² but will confine him to a descriptive man-

¹Per Lord Herschell, in the House of Lords. "*Yorkshire Relish*" case, 14 R. P. C. 720, 727.

²This rule is well stated in the *Bissell Plow* case, 121 Fed. 357, 366, where the court said: "The law has gone further than this, and prescribed a rule by which it can be determined whether what is done by the rival trader is calculated so to deceive such purchasers. That rule is that if what is done by such trader causes his goods to be known in the trade by the same name by which such other goods are already known therein, it is calculated to deceive such purchasers. . . . If, then, the use of any mark that will cause such an effect is an infringement of a technical trade-mark, it would seem to follow that, where no such trade-mark is involved, if what the second comer does in relation to his goods or business will have such an effect, it amounts to unfair competition. As in the other case, it causes his goods to be known in the market by the same name by which the first comer's goods are already known, and hence is calculated to deceive purchasers into buying his goods for that trader's goods, which is the test of unfair competition, as well of infringement of a technical trade-mark. And it has been so held." See also *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 77 Fed. 869.

ner of use, which will convey only the meaning he is entitled to convey and will not at the same time suggest that his goods are those of the complainant. This rule has been adopted and enforced in many cases. It applies to the use of one's own proper name,¹ to geographical names,² and to generic names.³ All of these classes of names may be used by any one in a proper manner to tell the truth about his own goods, but while the truth may be told, it must be told in a wholly truthful manner.⁴

In *Walter Baker & Co. v. Baker*, 87 Fed. 209, 210, the court said:

"So long as the title contains the words which in the trade and among consumers have come to be the every-day designation of complainant's goods, the chocolate so labeled will naturally be assumed to be complainant's, unless special care be taken to indicate that it is not."

¹*Clark Thread Co. v. Armitage* (C. C. A. 2nd Cir.), 74 Fed. 936; *affirming* 67 Fed. 896; *Walter Baker & Co. v. Baker*, 87 Fed. 209; *Walter Baker & Co. v. Sanders* (C. C. A. 2nd Cir.), 80 Fed. 889; *Walter Baker & Co. v. Slack*, 130 Fed. 514; *Bissel Plew Case*, 121 Fed. 357; *International Silver Co. v. Rogers*, 110 Fed. 958 (Roger's Silver Ware); *Reed Cushion Shoe case* (C. C. A. 2nd Cir.), 162 Fed. 887; *Meyer v. Bull*, 58 Fed. 884 ("Bull's Cough Syrup").

²*Oxford University v. Wilmore-Andrews Pub. Co.*, 101 Fed. 443 ("Oxford Bibles"); *Shaver v. Heller* (C. C. A.), 108 Fed. 821 ("American Ball blue"); *Montgomery v. Thompson* (1891), App. Cas. 217, 64 L. T. N. S. 749 ("Stone Ale"); *Wotherspoon v. Currie*, L. R. 5 H. L. 508 ("Glenfield Starch").

³*Roddaway v. Banham* [1896], App. Cas. 199 ("Camel's Hair Belting"); *Hansen v. Siegel Cooper Co.*, 106 Fed. 691 ("Junket Tablets"); *Williams v. Mitchell* (C. C. A.), 106 Fed. 163 ("Carrom Board").

⁴*Dr. A. Reed Cushion Shoe Co. v. Frew* (C. C. A. 2nd Cir.), 162 Fed. 887.

The "*Chickering Piano*" case is a notable, and the latest, application of this rule. *Chickering v. Chickering* (C. C. A. 7th Cir.), 215 Fed. 490.

If defendant's dictionary were "based upon" Webster's Unabridged Dictionary of 1847, that fact might be stated in the form in which it was stated upon the title page of the Crown Dictionary.¹ Such a manner of use could not deceive anyone as to the identity of defendant's book. But where, instead of stating "the whole truth and no less", as defendant was bound to do, defendant simply entitles its book "Webster's New Standard Dictionary", everyone is likely to be deceived. The use of such a title does not tell what defendant is entitled to tell, if the truth, but it does imply and tell an untruth in the sense in which it will be understood by practically the whole public and in which it was plainly intended by the defendant to be understood, and which furnished the motive for the change of name. The changed form of title page does not tell the fact claimed, and which was told by the Crown title page. One of the best illustrations of the proper form of decree in this class of cases is the one directed by Mr. Justice Harlan and Judge Wood in *Meyer v. Bull*, (C. C. A.) 58 Fed. 884, 886, set out below.²

¹See Exhibit "Crown Dictionary"; and see title page inserted ante facing p. 90. *Williams v. Mitchell*, 106 Fed. 168, 171.

²"That an injunction issue herein perpetually restraining the defendant, its servants and agents, and all persons in privity with it, from manufacturing and from selling, and from in any manner offering to sell, and from distributing and from in any way disposing of any remedy or preparation to which shall be applied in any form or manner, as the name and designation thereof, the words, 'Dr. B. L. Bull's Cough Syrup', or the words 'Bull's' and 'Cough Syrup', with or without other words, . . . and from in any other form or manner using any name or designation which is calculated to cause its article to be known in the market and sold under the name of complainant's article, or as

The argument that defendant has a right to use the title "Webster's New Standard Dictionary" to notify the public that its book is based upon the dictionary of Noah Webster is precisely answered by the Circuit Court of Appeals for the 8th Circuit in *Shaver v. Heller*, (C. C. A.) 108 Fed. 821, 824, where the defendant claimed the right to designate its goods "American Ball Blue" to indicate that they were made in America. The two answers given are equally applicable here: (1) An injunction against the use of the name *in the title* will not prohibit the use of the name for the purpose of telling any fact about the book, and (2) the defendant neither needs nor seeks to use the name Webster in its title for this purpose. The same answers were indicated in the "*Stone Ale*" case¹ where complainant's ale, brewed at the village of Stone, had become known as "Stone Ale". Lord Hannen said:—

"The appellant is undoubtedly entitled to brew ale at Stone, and to indicate that it was manufactured there, but there are various means of stating that fact without using the name which has now become the designation of the respondent's ale."

(c) *Adequate explanation and distinction is invariably required.*

Where defendant's use of a name may not be absolutely enjoined because its use by defendant is truth-

'Bull's Cough Syrup'. But the writ of injunction thus to be issued shall not (except as to the name or part of the name thereof, as aforesaid) prohibit the defendant from in every fair and lawful manner stating in the wrappers or labels by it used and otherwise that its article is by it manufactured and sold, and from so fairly and lawfully stating any other fact which it may elect or desire to state."

¹*Montgomery v. Thompson* (1891), App. Cas. 217.

ful and reasonably necessary, defendant must accompany his use of the name with an affirmative explanatory statement adequate clearly and unmistakably to distinguish his goods from those of the prior trader. A use of the bare name, without such explanatory statement amounts to an artifice intended and sufficient to deceive, and will, therefore, be enjoined as fraudulent. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169; *Merriam v. Saalfeld*, 198 Fed. 369.

The courts are stringent in their requirements of plain, adequate and unmistakably distinguishing statements in this class of cases, as will appear from the following cases, containing judicially approved forms of distinguishing statements which defendants have been required by injunction to use: *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169; *Elgin Nat'l Watch Co. v. Illinois Watch Co.*, 179 U. S. 665; *Herring-Hall-Marvin Safe Co. v. Hall Safe Co.*, 208 U. S. 554; *French Republic v. Saratoga Vichy Co.*, 191 U. S. 427; *Ludlow Valve Mfg. Co. v. Pittsburgh Mfg. Co.*, (C. C. A.), 166 Fed. 26; *Dr. A. Reed Cushion Shoe Co. v. Frew*, 162 Fed. 887 (C. C. A., 2nd Circuit); *Allegetti, etc., Co. v. Keller*, 85 Fed. 643, per Lacombe, J.; *Baker v. Sanders*, 80 Fed. 889, 895, (C. C. A., 2nd Circuit).

Defendant contests the obligation of using even an explanatory suffix; the court below required none, and the form sometimes used by defendant since the institution of this suit is inadequate (see *ante* this brief, pp. 103-6). At the very least, defendant should be required to state upon the title page, cover, and in advertisements, in a reasonably conspicuous way:

"This dictionary is not in the line of the original publication of Webster's Dictionary and its successors,

but is based upon the Imperial Dictionary of John Ogilvie."

We do not admit such basis, but if the finding below is accepted, there can be no objection to this form of explanation.

Of course, it is the books themselves which must be distinguished,¹ for the general public knows only the work, relies upon its title, and does not know the specific name of its publisher. (See *ante*, p. 43 *et seq.*) Defendant's own name on the book or in advertisements is no answer to this suit. "That is an aggravation, and not a justification, for it is openly trading in the name of another upon the reputation acquired by the device of the true proprietor." *Menendez v. Holt*, 128 U. S. 514.

If the false name is enjoined, no affirmative distinctions will be necessary.

VII.

DEFENDANT HAS INFRINGED COMPLAINANT'S REGISTERED TRADE-MARKS, OF WHICH THE NAME "WEBSTER'S" IS THE DISTINCTIVE FEATURE.

It is conceded that the title of a particular book is not a valid technical trade-mark for that book, for the reason that such a title is the generic description and name of that book. This is the point decided in the early Webster Dictionary cases.² The name of an author, whether his own name or a *nom de plume*, is also not a technical trade-mark, because descriptive.

¹"It is the word 'Rogers' that is all controlling, and it is that which should be differentiated in order to effectually distinguish the goods." *International Silverware Co. v. Rogers*, 72 N. J. Eq. 933.

²*Merriam v. Holloway*, 43 Fed. 451; *Merriam v. Famous*, etc., 47 Fed. 411; *Merriam v. Texas Siftings Co.*, 49 Fed. 944.

"*Mark Twain*" case, 14 Fed. 728. But these rules do not show that "Webster's" is not now a valid trade-mark for complainant's series of dictionaries. The use which has been made of that name for over a hundred years in connection with the dictionaries has already been stated.¹ It thus appears that Webster himself gave each of his books a formal and distinctive title which was printed on the title-pages, and duly recorded under the copyright law. None of such titles were in form or substance "Webster's Dictionary", or the equivalent.² Upon the outside cover, however, he marked each of the widely different books simply "Webster's Dictionary." That did not identify or describe any particular book, but it did indicate common origin and ownership of all of them in Noah Webster. That is the function of a trade-mark, and the words were used for that purpose. "It is doubtless correct to say that a person may have a right in his own name *as a trade-mark* as against a trader or dealer of a different name." *McLean v. Fleming*, 96 U. S. 245.³ But whether or not Webster had, or could have, a technical common law trade-mark in his name, complainant's use of it since Webster's death has made it their trade-mark. While complainant's dictionaries are the development

¹See *ante*, pp. 17-26. See also the title-pages and cover inscriptions of all these books, *Rec. vol. I*, pp. 671 *et seq.*

²See title-pages, *Rec. vol. I*, pp. 671 *et seq.*; "Copyright Certificates of Webster Series," *Rec. vol. I*, pp. 721 *et seq.*

³This case has not been modified or overruled by the later cases. *Brown Chemical Co. v. Meyer*, 139 U. S. 540; *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118. "Is not a man's name as strong an instance of trademark as can be suggested?—subject only to this inconvenience, that if a Mr. Jones or a Mr. Brown relies on his name, he may find it a very inadequate security, because there may be several other manufacturers of the same name." *Ainsworth v. Walsley*, 1. R. 1 Eq. 518, 35 L. J. Ch. 352. Cited with approval in *Brown Chemical Co. v. Meyer*, *supra*.

and outgrowth of dictionaries written many years ago by Noah Webster, he is not the author of complainant's present dictionaries, for he has been dead for seventy years. The name "Webster" in the common or short designation of complainant's books is not used or intended as a description of authorship—that is otherwise designated on each book. It is used to designate and identify complainant's dictionaries, and to indicate that they are all members of one series. As used by the complainant and its predecessors since about 1843, the name has become in fact and substance a common law trade-mark as fully as if any arbitrary word or name had been selected.

"A name, though originally the name of the first maker, may in time become a mere trade-mark, or sign of quality, and cease to denote or to be current as indicating that any particular person is the maker. In many cases a name once affixed to a manufactured article continues to be used for generations after the death of the individual who first affixed it"¹

In precisely this manner, complainant's dictionaries have become known, and are distinguished from the dictionaries of other publishers by the name "Webster." Complainant's changing series of revised editions is very much in the nature of a periodical publication. Under these circumstances the word "Webster" is a valid common law trade-mark.²

In 1890, complainant registered in the Patent Office, under the Trade-mark Act of March 3, 1881, two trade-marks for "dictionaries", and "educational

¹*Hall v. Barrows*, 4 DeG. J. & S. 150, 33 L. J. Ch. 204.

²*Social Register Assn. v. Murphy*, 128 Fed. 116; *Social Register Assn. v. Howard*, 60 Fed. 270; *Gannert v. Ruppert* (C. C. A., 2nd Circuit), 127 Fed. 962, per Coxe, J.; *Robertson v. Berry*, 50 Md. 591, 33 Am. Rep. 328.

books." These were alleged in the bill and infringement thereof was charged.¹ Certified copies of such certificates were offered in evidence, and the certificate of the Patent Office shows that they are still in full force and effect.² The essential features of the trade-marks thus registered are shown to be respectively: "The monogram composed of the letters 'N' and 'W' together with the word 'Webster's';"³ and the same monogram together with the words "Webster's International."⁴ In 1907, complainant registered eight additional trade-marks for dictionaries consisting respectively of the words: "Webster's Academic"; "Webster's Common School"; "Webster's Primary"; "Webster's High School"; "Webster's Condensed"; "Webster's Practical"; "Webster's National Pictorial", and "Webster's Countinghouse and Family." These were all registered under the "ten year clause" of the Act of February 20, 1905, § 5. These names had been long and exclusively used by complainant upon its smaller or abridged dictionaries. Certified copies of the certificates of registration were offered in evidence.⁵ It is immaterial whether or not these trade-marks would be invalid at common law as descriptive. The very purpose of the statute was to permit the registration of names and marks not amounting to valid trade-marks; if entitled to registration, they are entitled to protection as trade-marks. *Thaddeus Davids v. Davids*, 233 U. S., 461.

The statute expressly makes these certificates of registration *prima facie* evidence of the validity and

¹Bill, Rec. vol. I, pp. 55 et seq.

²Rec. vol. I, pp. 813, 817.

³Rec. vol. I, p. 820.

⁴Rec. vol. I, p. 816.

⁵Rec. vol. I, pp. 821 et seq.

ownership of said trade-marks. The convincing and uncontradicted evidence of long exclusive use, and of secondary meaning strengthens this presumption. Defendant *offered no evidence whatever to show invalidity of these registered trade-marks.* The answer *does not deny or contest the validity of these trade-marks,* but merely denies that defendant has infringed them.¹ The validity of all these registered trade-marks must, therefore, be taken as established, and the sole question in issue is as to defendant's infringement.

In complainant's registered trade-marks, the name "Webster's" is the prominent and distinctive feature. It has been demonstrated that the improper use of this name universally deceives the average purchaser, and this is the test of infringement of a registered trade-mark. Defendant's use of the name "Webster's" in the title of its dictionary (especially when without adequate distinguishing features, used in association, so as to give the antidote with the bane), infringes these registered trade-marks, and of itself entitles complainant to an injunction. *Thaddeus Davids Co. v. Davids*, 233 U. S. 461; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169.

In the *Davids Ink* case, *supra*, it was held that by the "ten-year clause", Congress had substantially adopted to the extent there indicated, the doctrine of "secondary meaning", as enforced in unfair competition cases, and made it a statutory right, within the federal jurisdiction. Defendant's violation of complainant's right in the "secondary meaning" of the name Webster's, and its actual deception of purchasers has been shown. (See *ante* this brief, pp. 35-39.) This shows infringement of complainant's registered trade-marks.

¹*Answer*, vol. II, p. 962, fols. 3845-6.

The *Singer* case (163 U. S. 169) is closely analogous to this case as to the trade-mark registered in 1876 under the Act of 1876. In that case the trade-mark consisted of the word "Singer" in combination with other features. Defendant's use of the name "Singer" was the sole thing which caused the initiative infringement, and defendant had a conditional right to use the name. Nevertheless, use of that name "without a plain and unequivocal indication of the origin of manufacture", was held to constitute infringement of the specific trade-mark of the Singer Company. So in this case, defendant's use of "Webster's", without any distinguishing indication, constitutes infringement of complainant's specific trade-mark.

In the decisions below no mention is made of the trade-mark features of the bill, although the matter was duly argued in both courts below, and failure to find and enjoin infringement was assigned as error in the Circuit Court of Appeals.*

VIII.

Complainant has been guilty of no fraud, but as the defendant has been infringing complainant's name on the name "Webster's" since prior to defendant's incorporation, of which defendant had actual notice before adopting its incorporation.

There is no element of fraud or estoppel in this case.

Defendant changed the title of its book from "Crown" Dictionary to "Webster's Dictionary" in

*Dec. vol. III, p. 2976, 3d. 2d. 2d.

July, 1868.¹ In the preceding January of the same year, the *Register* was now directed by the Circuit Court of Appeals in the First Circuit,² after that court had granted. Dickinson had actual notice of the decision when it adopted and began to use the name "Vindex" in the title of its documents,³ and he knew that Dickinson, although knowing of the decision, did not in any way comply with the requirements of that decision shown Dickinson's last letter and tract. The decision went upon its own interpretation of the law, saying that it bore the name "Vindex" and public property without restriction.⁴ The district court did not at any time notify the Masters of its proposed use of their trademark, or inquire whether they had any objection thereto, or whether or not it would violate any of their national rights, although the Dickinson knew that the Masters were the legitimate publishers of Vindex documents, and knew that they were then attempting to do everything within their power to suppress the same. (Prayer.) The Dickinson's use of the name was in no sense directed by, or made with, the approval, consent or acquiescence of complainant, and the complainant was guilty of no failure in objecting and asserting its claim. The complainant is the one who has been repeatedly and continuously infringing in the name its rights in the name "Vindex", and acting pursuant thereto against other intruders.⁵

¹See vol. 11, 12, 13, 14.

²See vol. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

³See vol. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

⁴See vol. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441,

In March, 1909, defendant's book was called to complainant's attention, and some correspondence ensued between the parties, which is spread upon the record.¹ While couched in language of business courtesy, these letters firmly notified defendant that its use of the name Webster was an infringement of complainant's rights. They refer to the pending litigation, and say that the book, under one of its many names, may be involved in one of them, but that they cannot verify that fact, which is natural, in view of its changed name, which defendant did not disclose, though the circumstances called loudly for explanation. In the final letter of April 2, 1909, the Merriams wrote:

"We shall doubtless have occasion to write you again about your book, but we shall ask nothing but what is proper and reasonable under the court decisions, and you will, of course, expect to grant no less." (*Rec. vol. II*, fols. 4271-3.)

Defendant never replied to this letter, but continued its publication in utter disregard of the "court decisions" already rendered, and to be rendered in the pending litigation. This letter was a plain notice that complainant was litigating the question, and reserved its rights against defendant pending the outcome of that litigation. Defendant so understood it,² and was thereby put on notice. It knew the law as well as complainant could know it, and continued its infringement at its peril.

¹*Rec. vol. II*, pp. 1065 to 1077.

²"I understood that there had probably been some court decisions or decision, which the Merriam Company considered in their favor, and that would bear upon the publication of Webster's dictionary by anybody." *Wright, vol. II*, p. 1086, fol. 4342.

At the time of this correspondence in 1909, complainant did not have all the information necessary to enable it to take effective action. It did not then know that defendant's dictionary was simply the old "Crown Dictionary" with the name changed to "Webster", the defendant having suppressed all identifying features, such as title, author's and publisher's name, and the original copyright notice. As Mr. Justice Swayne said in *Pence v. Langdon*, 99 U. S. 578, 581:

"There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do."

Upon discovery of the fact that defendant's book was simply the old "Crown" Dictionary with name changed to "Webster's", defendant was immediately notified to cease using the latter name, and upon its refusal, this suit was promptly brought.¹ Judge Coxe granted a preliminary injunction, to which laches, if there had been any, would have been a defence. It was not until the parties were taking proofs for final hearing that the full enormity of defendant's fraud became apparent, and it was discovered that this so-called "Webster's Dictionary" was simply a reprint of a British book known and originally published as the "British Empire Dictionary".²

In short, it appears, without any contradiction, that defendant deliberately adopted and used the name "Webster" upon a copy of the old Crown or British dictionary, that it removed every feature from title page or cover which might show the true identity and origin of the book, that it did nothing whatever to distinguish its book from complainant's well-known

¹*Rec. vol. II*, pp. 1070, 1078.

²*Rec. vol. I*; *Mawson*, pp. 541-2; *Taber*, pp. 610, 613.

books of that name, and that all this was done with full knowledge that the complainant was claiming special rights in the word Webster and was actually litigating the question in the courts.

There is no possible element of laches or estoppel. The defendant was not misled. It had prompt notice that complainant objected to its use of the name "Webster", and although it was not itself sued until two and one-half years later, yet all this time the complainant was litigating the same or similar questions with other infringers, and defendant knew it. As has been said: "They were under no obligations to sue every one at the same time."¹

Defendant's admitted knowledge of complainant's rights and claims, and of the prior and pending litigation absolutely precludes any claim of laches or estoppel, for it shows that defendant was not misled or prejudiced by complainant's failure to sue it sooner. *Insurance Co. v. Eldredge*, 102 U. S. 545; *American Bell Tel. Co. v. Southern Tel. Co.*, 34 Fed. 795, where the remarks of Mr. Justice Brewer are peculiarly applicable to the present situation. *Edison Electric L. Co. v. Mt. Morris Electric Co.* (C. C. A. 2nd Cir.), 58 Fed. 572.

Moreover it appears that defendant's sales had been "very immaterial"² until early in the year 1911, when defendant began its grossly fraudulent newspaper campaign, which has already been described. This suit was brought only a few months after the beginning of this campaign and while it was in progress.

¹Per Lacombe, J., in *Timolat v. Franklin Boiler Works* (C. C. A. 2nd Cir.), 122 Fed. 69; *American Graphophone Co. v. National Gramophone Co.*, 90 Fed. 824; *Edison Co. v. Mt. Morris Light Co.*, 57 Fed. 642.

²*Swift, Rec. vol. II, fols. 1147; 4587.*

It is, of course, familiar law that mere delay, not accompanied by circumstances constituting an estoppel, or abandonment, is never a bar to a final injunction to stop infringement of a trade-mark, or unfair competition and in support of the legal right. *Menendez v. Holt*, 128 U. S. 514. *M'Lean v. Fleming*, 96 U. S. 245. *Saxlehner v. Eisner*, 179 U. S. 19. *French Republic v. Saratoga Vichy Co.*, 191 U. S. 439.

In the case at bar, however, there has been no delay in the assertion of complainant's rights, and there is no circumstance of laches or estoppel to bar either an injunction or an accounting.

IX.

COMPLAINANT HAS BEEN GUILTY OF NO INEQUITABLE CONDUCT; ITS HANDS ARE CLEAN.

Defendant contended below that the dismissal of the bill was right because of alleged inequitable conduct of the complainant in three respects: (a) Alleged inequitable circumstances attending the bringing of the suit; (b) the publication of Webster's New International Dictionary under that name in 1909, and (c) the continued publication and sale of Webster's Condensed Dictionary.

(A) *Circumstances under which this suit was brought.*

Defendant first charges that between 1890 and 1904 complainant brought unjustifiable suits,¹ claim-

¹*Merriam v. Holloway* (1890), 43 Fed. 450; *Merriam v. Famous, etc., Co.* (1891), 47 Fed. 411; *Merriam v. Texas Siftings Co.* (1892), 49 Fed. 944; *Merriam v. Straus* (1904), 136 Fed. 477; *Merriam v. Ogilvie* (1904), 149 Fed. 858, (C. C. A.) 159 Fed. 638, (C. C. A.) 170 Fed. 167. For completeness we add to defendant's list: *Merriam v. Saalfeld* (1911), 190 Fed. 927, 198 Fed. 369.

ing superior rights in the name Webster, and that in each one of these suits its claims were pronounced "all nonsense." As a matter of fact, the exact contrary was the result. The decision in every case, without exception, was in favor of complainant, and the decisions resulted in establishing complainant's prior and "superior" rights in the name "Webster's" as applied to dictionaries.¹ A successful suit in equity in which complainant obtained equitable relief cannot be deemed inequitable or unjustifiable. In the *Ogilvie* case, although this complainant was enjoined from *circularizing* Ogilvie's customers with a claim of exclusive right, when, as the court found, it had only a conditional or secondary meaning right, yet the court found that the Merriam claim was "*honestly made*" (170 Fed. *loc. cit.* 171), and granted to the Merriams equitable relief in that very suit by way of injunction compelling Ogilvie to respect the Merriam's "superior" rights in the name "Webster's." The full injunction so granted has been already quoted. It is not as stated by defendant and the court below.² The claim that the suit at bar is a tort has been answered in the comments on the opinion below.³

In the *Saalfeld* case (190 Fed. 927; 198 Fed. 369) the Circuit Court of Appeals for the Sixth Circuit declared in unmistakable terms the "superior rights" of the Merriams in the name Webster's, and granted both an injunction and an accounting because of violations of them.

The claim that complainant was guilty of laches or other inequitable conduct because it waited two and

¹These cases are cited, and their results given elsewhere in this brief. See *ante*, pp. 16, 17; 84; 110; 112, 113.

²See *ante*, p. 108.

³See *ante*, pp. 103-110.

one-half years, and did not sue defendant until November, 1911, is without merit (see Point VIII, *ante*, p. 142-6). Defendant had actual notice of complainant's claims, and that it was prosecuting test cases against other infringers.

(B) *Webster's New International Dictionary*.

Defendant asserted below that the use of the above title upon complainant's 1909 revision is a misrepresentation depriving complainant of any right to equitable relief upon the principle of the *Fig Syrup* case (*Warden v. California Fig Syrup Co.*, 187 U. S. 516). The contention is based upon the admission of complainant that this unabridged 1909 edition "is of almost totally different literary contents from any book with which Noah Webster had anything to do." (*Rec. vol. I*, fols. 695-702). This statement was made with reference to the growth of the dictionary, through successive revisions and editions in the course of seventy years, from the 70,000 words contained in it at Webster's death to the 400,000 words and phrases contained in this latest edition.

The claim that because the original proprietor has continuously revised, enlarged and improved this standard reference work, and continued to use its original and distinctive name, it is guilty of fraud on the public; that its hands are therefore unclean; and that equity will turn it out of court, hardly deserves serious consideration.

The court below rejected this contention, saying:

"Of course, a 'Webster' dictionary must own Webster as its father originally; and in the case at bar, although the heredity of the complainants' 1909 Webster is all that gives it its character as a Webster, yet it still has that char-

acter, remote now as the content may be." (*Rec. vol. III*, p. 2062).

Of course, an assignee or successor in a business in which a personal name has been used may continue to use that name in the business without being open to the charge of unclean hands, provided no misrepresentation is made. *L. E. Waterman Co. v. Modern Pen Co.*, 35 Sup. Ct. Rep. 91; *Kidd v. Johnson*, 100 U. S. 617; *Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.*, 208 U. S. 554; *Dr. S. A. Richmond Nervine Co. v. Richmond*, 159 U. S. 293, where the court said: "The fact that such trade-mark bears Dr. Richmond's *own name and portrait* does not render it unassignable to another"; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, where the court said: "There are a few cases indicating that the mere right to use a name is not assignable, notably *Chadwick v. Covell*, 151 Mass. 190, but none that it may not be assigned . . . to a successor in business as an incident to its goodwill. *Ainsworth v. Walmsley*, L. R., 1 Eq. 518."¹ "The name . . . becomes the denomination of the article itself, and is no longer a representation that the article is the manufacture of any particular person." *Hall v. Barrotes*, 4 DeG. J. & S. 154. Complainant is the direct successor of Noah Webster, claiming under contracts which expressly authorized it to make and publish new and revised editions and abridgements. Of course, it has the right to continue the use of the name on all the books of the series. Complainant has scrupulously stated, upon the title pages, and in the prefaces of the several editions, the exact facts as to authorship and editorship, the

¹See quotation from this last cited case, *ante*, p. 138 of this brief.

changes and additions which have been made, and the relation of each book to preceding books of the series.¹ Thus the title page of the book criticised by defendant reads: "Webster's New International Dictionary of the English Language. Based on The International Dictionary of 1890 and 1900, Now Completely Revised in All Departments, Including also A Dictionary of Geography and Biography, Being The Latest Authentic Quarto Edition of The Merriam Series, W. T. Harris, Ph. D., LL.D., Editor in Chief, F. Sturges Allen, General Editor," etc. On the outside cover the book is stated to be "The Latest Authentic Edition of The Merriam Series, G. & C. Merriam Co."² This is beyond all criticism. The title pages of the editions of 1890 and 1900 read: "Webster's International Dictionary of The English Language; being the authentic edition of Webster's Unabridged Dictionary Comprising the editions of 1864, 1879, and 1884, Now thoroughly revised and enlarged under the supervision of Noah Porter, D.D., LL.D., of Yale University, With a voluminous Appendix", etc. On the back this book is described as: "The Authentic Unabridged Revised and Enlarged."³ All the books of complainant have been described in like manner, and it is impossible to find just cause for criticism, or to impute unclean hands.

While complainant's book does "own Webster as its father originally", and its history and the continuity of its development justify its name, it is believed that no justification is necessary. Complain-

¹See *Title Pages of Webster Series, Rec. vol. III*, pp. 677 *et seq.*, and see the books themselves.

²*Rec. vol. I*, p. 715, and see book itself.

³*Rec. vol. I*, pp. 702 and 710, and see the books themselves.

ant has made its books famous under that name, and there is no prior user whose rights are invaded; its predecessors in title were the first and original users of the name.¹

Defendant's whole argument that the title, "Webster's New International Dictionary", is a false and deceptive title, rests upon its position that today the name "Webster's" in the title of a dictionary means only that part of the matter actually written by Noah Webster himself. The proofs abundantly established that the name "Webster's" in the title of a dictionary means, and for many years has meant, a composite literary production made by numerous lexicographers, including Noah Webster, Chauncey A. Goodrich, Noah Porter, Dr. Harris, Professor Sheldon, and others. Certainly an order given today for a Webster's Dictionary would not be properly filled if a copy of the 1828 edition was supplied.² As shown by the evidence, States and School Boards throughout the land prescribe Webster's Dictionary as the standard authority to be used in the schools or in public departments. Is it reasonable to assume that any one could fill these

¹A similar situation was recognized by Lowell, J., in *William Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co.* (C. C.), 11 Fed. 495, 498, where he said: "Both parties have fallen into the mistake of supposing that it was important to have a Rogers and his son to authorize them to use the trade-mark Rogers & Son. The law is not so. Any one might use that trade-mark for the first time that it was used, and if there was no Rogers in the same business no Rogers could complain. *Levy v. Walker*, L. R. 10 Ch. D. 436; *Massam v. Thurley Co.*, L. R. 14 Ch. D. 748." And these remarks were quoted with approval in *National Distilling Co. v. Century Liquor & Cigar Co. et al.* (C. C. A., 6th Cir.), 183 Fed. 206, 208.

²*Putnam*, fols. 1566; 1573; *Wadlin*, fols. 1869; 1874; *Mead*, fols. 1893-4; 1922; 1930; *Clarke*, fols. 1940-3; *Adams*, fols. 1966-8; 1992; *Draper*, fol. 2000.

orders and contracts with photographic reprints of the obsolete 1828, or 1840, or even of the 1847 edition? Would it not be a breach of contract to attempt to do so? Would not an order today for Webster's Dictionary imply *the modern dictionary* of that name in current and public use?

The proof shows that the name Webster's Dictionary today means what Webster's Dictionary has become, not what it was seventy or more years ago, and that the popularity and demand for this dictionary arises from the excellence and high repute of editions compiled by complainant long after Webster's death. Defendant's statement, made below, that "the popularity of this dictionary arises from the belief in the mind of the ordinary purchaser that he is buying a dictionary the essential contents of which is Noah Webster's work," and "the public's desire to possess the product of that celebrated lexicographer" is contrary to the evidence, and is refuted by Judge Hand's finding below, that to describe a dictionary as "one of the original Webster's dictionaries published by Webster himself . . . would probably destroy any possibility of its sale". (*Rec. vol. III, fol. 8234.*) The testimony shows that the average purchaser relies wholly upon the reputation and authority of the complainant's current Webster's Dictionary.

Defendant claims that

"To the ordinary citizen the name of this celebrated lexicographer [Webster] in the title of a dictionary plainly describes to plain people what it plainly signifies, namely, the part of the book which the celebrated Webster wrote" (Deft.'s brief below, p. 16; see also pp. 17, 18, 19).

There is not a scintilla of evidence to show that Webster's has any such discriminative meaning to any one. "Webster's Dictionary" has been the name or title, and the generic description of many successive dictionaries. It has always been descriptive of *the book as a whole* to which it was applied. Since 1847 the name has not designated solely "that part of the book which Webster wrote", but has designated a composite production. As the book grew through successive revisions to more than five times its original size and contents the name identified and now identifies the series. In the Ogilvie case (159 Fed. 638, 642) it was held that the phrase "Webster's Dictionary" indicated the work which had been built up by the Merriams. In all the prior adjudications relief was awarded to complainant upon the theory that Webster's Dictionary meant primarily not the personal contributions of Noah Webster, but the current series published by the Merriams.

Every one of complainant's successive editions plainly stated upon its title page the exact facts as to authorship, and its relation to previous editions.¹ These facts were further elaborated in the prefaces of the several editions. There was no misrepresentation, no concealment, no ambiguity even. Each one of these editions became known in its time to the public as Webster's Dictionary. Since 1890, or for 25 years, those words when used to refer to a large or unabridged dictionary have meant "Webster's International Dictionary", compiled by complainant's editorial staff, headed by Noah Porter, and including numerous distinguished assistants. Defendant con-

¹See *Title Pages, Rec. vol. I*, pp. 677, 684, 686, 695, 697, 698, 702, 711, 715.

ceded below that this edition was properly entitled "Webster's" (Brief, p. 23). That famous "Webster" matter has been carried forward into, and forms the basis of the 1909 Webster's New International Dictionary, which is plainly described as a revision and enlargement of it. Defendant's expert, Prof. Peck, testified that complainant's dictionaries "are all properly called "Webster's Dictionary."¹ Must the publisher of a standard reference work abandon its name, and throw away its good-will, because the successive revisions, in the course of almost a century, have necessarily made the latest edition different from the first edition? Is it a fraud, for example, to publish and sell the eleventh edition of the *Encyclopædia Britannica* under that name, because it is totally different from the work of that name which was famous a hundred and thirty-two years ago? Are complainant's hands unclean because they have kept their work abreast of the times? Must an old concern abandon the trade name of its series of publications because the original authors have died?

(C) *Webster's Condensed Dictionary*.

Defendant contends that complainant's hands are unclean because of certain alleged misrepresentations in connection with its "Webster's Condensed Dictionary" made upon the book itself and in advertisements of that book.

It appears from the testimony, without dispute, that complainant owns and publishes this book and sells it to the firm of Reilly & Britton, who are book-sellers, and to no one else. Reilly & Britton are the exclusive vendees of this book, and they sell it in the

¹*Rec. vol. III, fol. 6306.*

retail trade upon their own account and not as agents of the complainant.¹ The complainant had nothing whatever to do with the advertisement and sale of this dictionary by Reilly & Britton, and did not see or know of the advertisements to which defendant takes exception until called to their attention during the course of this suit.² Even if it were true that Reilly & Britton's advertisements were open to criticism, it would not affect complainant's right to relief, nor make their hands unclean. *Royal Baking Powder Co. v. Royal*, 122 Fed. 337, 345, per Lurton, J.; see also Judge Hand's opinion below (fol. 8279), where speaking of defendant Cupples & Leon Co., advertisements, he said:

"Moreover it does not certainly appear that the defendant is responsible for his customers' advertisements."

The incompetent hearsay detailed by defendant's Vice-President, Mr. Swift, is the sole evidence offered to show that Reilly & Britton and Mr. Murphy sold this book as complainant's agents, and it was specifically denied by Mr. Murphy, Mr. Britton and Mr. Washburn.³

Complainant, of course, assumes full responsibility for the book itself. It was originally compiled, published and copyrighted by complainant in the year 1884 under the title of "Webster's Condensed Dictionary". In 1906 some changes and revisions were made and a new copyright was entered to cover the new matter,

¹*Rec. vol. I: Washburn*, fols. 2537-2543; *Britton*, fols. 2363-2367; *Murphy*, fol. 2466.

²*Washburn, Rec. vol. I*, fols. 672, 2541-2549; *Britton*, fol. 2367.

³*Rec. vol. I: Murphy*, fols. 2466-2467, 2486-2487; *Britton*, fols. 2376-2379; *Washburn*, fols. 2541-2543.

and the book continued to be sold under its original title and with notices of both the 1884 and 1906 copyrights upon the back of the title-page. In 1909 further additions and changes were made in the book, including a new appendix, comprising about 126 pages of wholly new matter.¹ This edition was duly entered for copyright, and thereafter the book continued to be published under its original name of Webster's Condensed Dictionary, with its original title-page, to which was added a description of the additions made to the book, and copyright notices bearing all three dates, viz., 1884, 1906 and 1909, were printed upon the back of the title-page. All these copyrights are still in force. Complainant surely is entitled to continue to publish and sell this book under its original name, as long as there is a demand for it, and there is no possible impropriety in doing so. Defendant criticises the use of the phrase "Twentieth Century Edition" upon the 1909 edition of this book. That statement is true. It is an edition with new and revised matter first published and copyrighted in 1909. The additions and revisions were substantial, although in the main vo-

¹Mr. Washburn, complainant's secretary, testified with respect to the 1906 and 1909 editions of Webster's Condensed Dictionary as follows: "Supplemental matter has been added at the back, and in this latest book a very considerable number of corrections and additions have been made in the text" (fol. 669). These corrections and additions in the body of the book were made by cutting out matter in the plates and substituting other matter (fol. 660). Speaking of the Twentieth Century Edition, the witness said: "That book is a book that had additions that were made at the time the copyright was taken out in 1909, as I recall it. . . . Changes were made throughout the book where it was found necessary; additions and much supplemental matter was added at the back. . . . Such additions in the text were made as we then deemed necessary. . . . As we fixed it up in 1909 it is pretty well up to date." (Rec., fols. 659, 661, 662, 663, 666.)

cabulary the plates of the 1884 edition were corrected and used. It is the latest edition of that particular book. It is the twentieth century edition of the book always and still known and called Webster's Condensed Dictionary.

Defendant also criticises the use of the date "1911" in the publisher's imprint at the foot of the title-page. But as Judge Shipman said in the *Texas Siftings* case (49 Fed. 944, 946), dates in the publisher's imprint upon a book "denote the year in which a book is printed, and do not necessarily denote that it is a new edition of that year". Defendant's own witnesses have testified in this case that this is the fact, and that it is the custom in the publishing trade to indicate the date of printing the particular volume by the date in the publisher's imprint, and that this date is changed from year to year.¹ In accordance with this custom, the defendant itself has changed the date in the imprint in its dictionary from year to year. In addition, the complainant has always retained and used each of its copyright notices containing the true date when the copyright upon the book was entered so that no one could be misled or deceived. The defendant however suppressed the copyright notice of its "Crown Dictionary" when it changed the name to "Webster's Dictionary."

The advertising phrases criticised by defendant, while something for which complainant is in no way responsible, as already shown, are mere trade puffing or boastful dealer's talk and are wholly insufficient to support a defense of unclean hands in any event. *Holeproof Hosiery Co. v. Wallach Bros.* (C. C. A., 2nd Cir., 172 Fed. 859). The statements that the diction-

¹*Rec. vol. II: Pfanstichl*, fols. 4077, 4083; *Hesslein*, fols. 4044-4046; *Wright*, fols. 4332-4335.

ary contains "all the new words"; that it is a "splendid up-to-date lexicon"; that it is a "genuine Twentieth Century Webster's Dictionary"; and that it is a "genuine 1911 edition of Webster's dictionary" are true. Some of the criticisms now advanced are really puerile. The statement that the book was bound in "seal grain morocco" is true because that is the recognized trade description of the binding actually used.¹ The charge that this book was advertised as an abridgment of the "New International" published by complainant in 1909, is incorrect. There is no such proof. At most a single ambiguous advertisement was once published subject perhaps to that construction. Complainant is not connected with it, and there is no proof that it was ever repeated. Certainly complainant's good-will does not owe its value to this single inaccuracy, if it be one. It is no defense. *C. F. Simmons M. Co. v. Mansfield Drug Co.*, 93 Tenn. 84; *Johnson v. Seabury*, 71 N. J. Eq. 36. As already stated, the book itself states upon its title-page that it is based on the Unabridged Dictionary of Noah Webster, edited under the supervision of Noah Porter. This was the well known 1864 edition. The advertisements repeat this statement. Thus one of them stated in large type:

"This splendid up-to-date lexicon of the English language, publish by G. & C. Merriam & Company, is a practical abridgment of the well known unabridged, which with its successor the New International is the accepted authority on the English language, endorsed", etc. (*Rec. vol. III*, fol. 6883).

Another stated:

"It belongs to the genuine Webster family. The great Unabridged is its parent; the New

¹*Britton, Rec. vol. I*, fol. 2380.

International its uncle." (*St. Louis Republic*, Sept. 24, 1911. Deft's Ex. Book, p. 20.)

In view of the fact that both the book itself and the advertisements proclaimed that this book was originally compiled in 1884, and was based upon the Unabridged Webster of 1864, it is surely absurd to claim that it was intentionally represented as an abridgment of the New International of 1909. The statement as made is substantially true, because it is an abridgment of the "larger work," and the New International was itself based on the "Unabridged."

X.

THE USUAL ACCOUNTING SHOULD BE DIRECTED.

There being no circumstance of laches, estoppel or other inequitable conduct upon the part of complainant, it is entitled to both an injunction and an accounting of damages and profits.

The defendant in this case has sold an enormous number of its dictionaries, aggregating several hundred thousand copies. It admits profits of from \$50,000.00 to \$100,000.00. It has put out the books through newspapers under flaring and deceptive advertisements trading upon the name of "Webster's Dictionary," and filled with grossly fraudulent statements, and inuendoes. Almost certainly, ninety-nine per cent. of the purchasers of these dictionaries have bought them under a misapprehension of what they were buying. Defendant's infringement of complainant's trade-name and trade-mark was willful and deliberate, and without any justification whatever. Its book had a name of its own, and if it were intended to sell it upon its merits, there was no need to change its name and

adopt the name of complainant's books. Complainant has been enormously damaged, its sales having fallen off in localities where defendant prosecuted its newspaper campaigns to the extent of approximately fifty per cent. Defendant has reaped where complainant has sown, and should be compelled to account for its unlawful profits.

The decision upon the rehearing in the *Saalfield* case, where a precisely similar question was elaborately considered and determined, is an exact authority in favor of complainant's right to an accounting. *Merriam v. Saalfield*, 198 Fed. 369. The Circuit Court of Appeals for the Sixth Circuit there followed and applied the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Florence Mfg. Co. v. Dowd*, 189 Fed. 44, and said:

"Applying the rule there recognized, it is sufficient for the purpose of the present case to say that the usual practice contemplates an accounting and that such practice should be followed and an accounting ordered, unless it is made clearly and certainly to appear that neither upon the existing record nor upon any record which complainant can make before the Master could there be any substantial recovery. If there remains any fair probability that the complainant can produce the necessary proof . . . then the complainant should have the opportunity to make and present his case."

This rule is well established, and it would be useless to multiply citations. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169.

In *Westinghouse Co. v. Wagner Elec. Co.*, 225 U. S. 604, this court explained and qualified the *Garretson* case, 111 U. S. 120, which for so long a time rendered

accountings nugatory, and the reasons for denying accountings in the past no longer exist in the same measure.

XI.

CONCLUSION.

It is submitted that the decree below should be reversed and a decree directed to be entered in conformity with settled rules of law and the preponderance of the proofs.

The complainant is entitled to a final decree on the merits enjoining the defendant, and directing an accounting of the profits made by the defendant.

The form of the decree, based upon decrees in analogous cases, should be substantially as follows:

1. Enjoining and restraining the defendant, its officers and agents and all others claiming or holding through or under them from using the name "Webster" in the title or in any short name of the Crown Dictionary or the British Empire Dictionary or any reprint or edition thereof, or in any way or manner calling or advertising such dictionary as a "Webster's Dictionary" or as a "Webster's New Standard Dictionary", or in any equivalent terms, or in any other way or form calculated to deceive members of the public into purchasing said Crown Dictionary or any revisions or editions of it under the belief that it is a Webster's Dictionary published by the complainant.

2. Or, if only a conditional and not an absolute form of injunction is granted, enjoining and restraining defendant from using the name Webster as above specified, unless accompanied with the following statement, plainly printed and prominently displayed in a

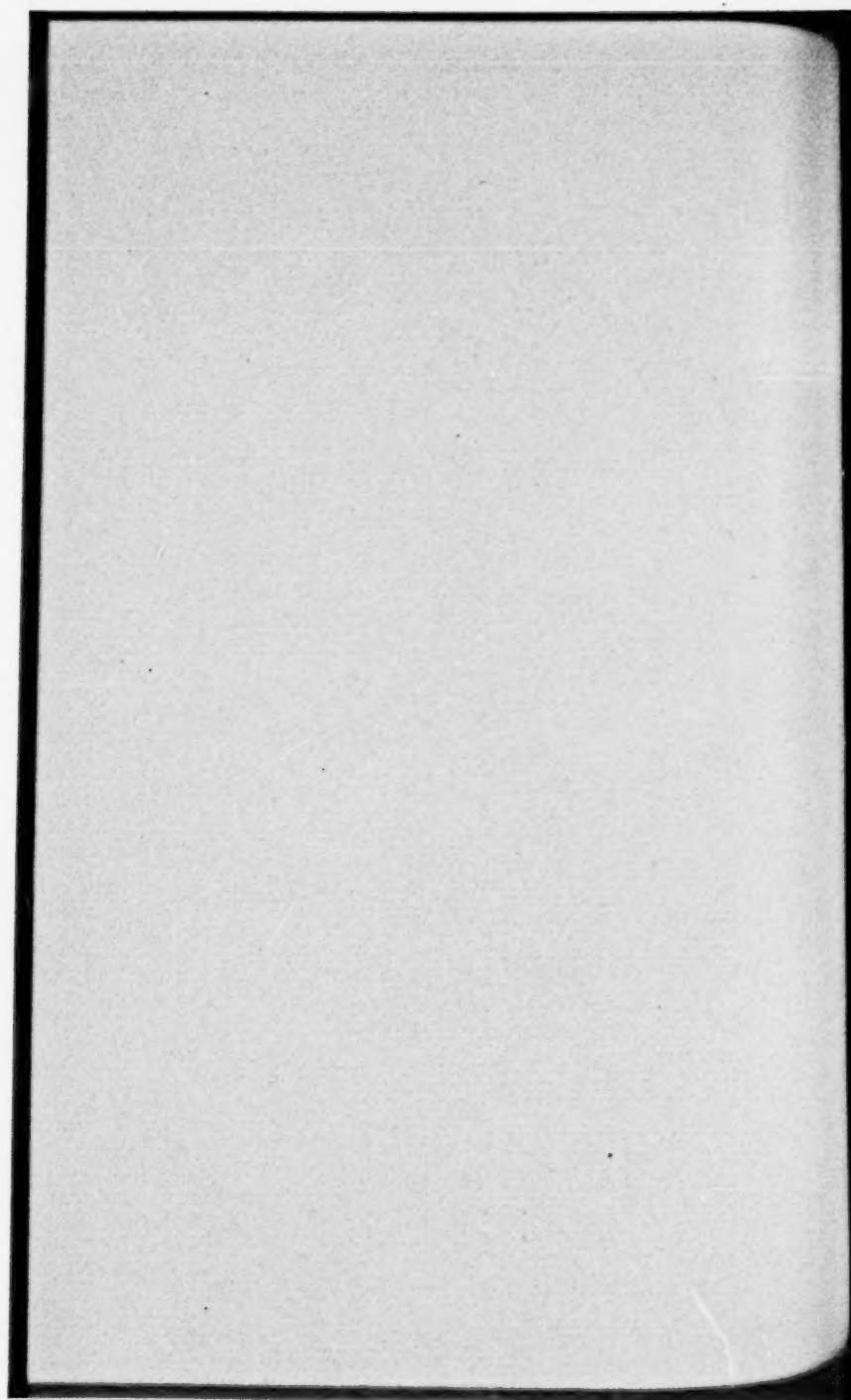
line or paragraph by itself, and in no way minimized or neutralized, upon the title page, and upon the outside front cover or back of said dictionaries, and in each circular, notice, announcement and advertisement thereof, viz:

"This dictionary is not in the line of the original publication of Webster's Dictionary and its successors, but is based upon The Imperial Dictionary of John Ogilvie."

3. Directing that the defendant account to the complainant for all and singular the profits which the defendant has made and the damages which the complainant has sustained by reason of the unlawful use by the defendant of the name "Webster" as the title or short name of the Crown Dictionary.

New York, February 1, 1915.

WILLIAM B. HALE,
Counsel for complainant-appellant.



APPENDIX.

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APPELLANT'S ABSTRACT OF THE TESTIMONY.

The following is an abstract of the evidence, with references to the record, upon the principal matters of fact involved in this case. Evidence sufficiently stated in the brief proper is not here duplicated.

I.

HISTORY AND CHRONOLOGICAL STATEMENT OF THE PUBLICATION OF WEBSTER DICTIONARIES FROM 1806 TO THE PRESENT DATE.

The original series of "Webster's" dictionaries began in the year 1806, and has been continued without break by successive new and revised editions down to the present time. *Complainant and its predecessors in title have been the sole proprietors of this series of dictionaries during this entire period of more than a century.* Until after 1889, complainant and its predecessors were the sole proprietors of all dictionaries published in this country under the name of Webster; and no rival or competitive dictionaries were made or published under the name of Webster by any one during this period. After 1889, however, rival or competitive books were published by other parties, as hereafter stated, and litigation ensued, some of which is shown by the so-called "Webster Dictionary Cases."

In analyzing the evidence which conclusively establishes the above statement of fact, it will be convenient to follow the order adopted by defendant below, and divide the time into three periods: First, the period from 1806 to 1847, when the Merriams acquired their title; second, the period from 1847 to 1889; and third, the period from 1889 to date, covering the pseudo Webster publications in competition with those of complainant.

FIRST PERIOD: 1806-1847.

The following is a list of all the dictionaries having the name "Webster" either shown or claimed to have been published during this period.

- (1.) 1806. "*A Compendious Dictionary*", etc. Cover title, "*Webster's Dictionary*."

This was the first "*Webster's Dictionary*." It is a small book written by Noah Webster, and copyrighted and owned by him, and never transferred or assigned. He caused it to be printed at "*Sidney's Press*," and marketed it through "*Hudson & Goodwin, Booksellers*," and "*Increase Cooke & Co., Booksellers*." No new or revised editions appear to have been ever printed. The copyright expired in 1834. *Rec. vol. I*, p. 671, fol. 2881.

- (2.) 1807. "*Webster's Common School Dictionary*."

This was a small dictionary, compiled, copyrighted and owned by Noah Webster. It was printed at "*Sidney's Press*" and marketed through J. & D. West, whose name appears in the imprint. The copyright was never assigned and expired in 1835, and apparently the book was never reprinted. Two different books under the same title were compiled and issued by the Merriams in 1867 and 1892. *Rec. vol. I*, p. 722, fol. 2885; *vol. III*, p. 1786, fol. 7145.

- (3.) 1828. "*An American Dictionary*", etc. Cover title, "*Webster's Dictionary*".

This was the first edition of the famous "*Webster's Unabridged Dictionary*". It was wholly compiled by Noah Webster who copyrighted it in his own name for his own benefit, and remained its proprietor until his death in 1843. After his death, this copyright, and the renewal thereof, were assigned to, and vested in, G. & C. Merriam, complainant's predecessor. The renewed copyright expired in 1870. *Rec. vol. I*, p. 672, fol. 2685; p. 722, fol. 2888; p. 738, fol. 3129, *et seq.*; p. 809, fol. 3233; p. 810, fol. 3237, *et seq.* See also *preface to Webster's International Dictionary* filed as an exhibit.

Webster printed and marketed this edition of his unabridged dictionary through "*S. Converse*", whose name is in the imprint, but remained himself the sole proprietor thereof.

(4.) 1828. *Cover title, "Webster's Dictionary".*

This was a small dictionary abridged from the "Unabridged Dictionary" described in (3), and prepared, "For the use of Primary Schools and the Countinghouse." It was prepared by Noah Webster himself who copyrighted it in his own name and remained at all times its proprietor. After his death, this copyright was renewed by Webster's heirs, who transferred their rights to the Merriams, and the copyright finally expired in 1870. Webster first printed and marketed this book through White, Gallaher & White, (*Rec. vol. III, fol. 7136-7*); then through N. & J. White (*Rec. vol. I, fol. 2694*). In 1842 this same book was being marketed by Webster through Huntington & Company, (*Rec. vol. III, fol. 7130*). The Webster copyrights and proprietorship, together with the Huntington publishing rights in this book, were transferred to complainant's predecessors, G. & C. Merriam, together with those of all the other "Huntington Abridgments", in or about the year 1854, as hereafter stated under (7) and (8).

(5.) 1829. *"An American Dictionary", etc. Cover title, "Webster's Dictionary".*

This was a small dictionary abridged from the Unabridged Dictionary described in (3). It was usually termed the "Octavo Abridgment". As stated in the preface, the work of abridgment was performed by J. E. Worcester under Webster's direction. It was copyrighted jointly by Webster and Worcester. Webster was the proprietor of the work, of the basic copyright, and of the copyright of later editions. An early edition of the book was marketed through N. & J. White in 1838, and through White & Sheffield in 1839. (*Rec. pp. 673; 1783*). In 1841 a new edition, copyrighted by Noah Webster, was marketed through Harper and Bro., and also perhaps through White & Sheffield. (See *Rec. vol. I, fol. 3142*). In 1847, after Webster's death, another new edition was prepared and copyrighted by Chauncey Goodrich, Webster's son-

in-law, for the benefit of Webster's estate. This edition also was handled through Harper Bro. (*Rec. vol. I*, fol. 3142). In 1857, the original copyright was renewed by Webster's children, who granted a license under the renewal copyright to J. B. Lippincott & Co. In 1858 G. & C. Merriam, complainant's predecessor, bought from Lippincott the latter's license contract. In 1860 G. & C. Merriam prepared and copyrighted a new edition of this book, and published it under a royalty contract through J. B. Lippincott & Co. *Rec. vol. I*, pp. 673; 685; 783; 795; 809; *Rec. vol. III*, p. 1783; fol. 7132. See three editions of book with copyright dates, 1829, 1841, 1860.

This book, therefore, in all its editions, has been continuously the property of Noah Webster, then of Webster's executors and children, and then of G. & C. Merriam, complainant's predecessor. The numerous so called "publishers", including White, White & Sheffield, Harper, and Lippincott, merely printed and marketed the book under royalty contracts with its proprietor. These publishing houses did not make new and revised editions. They simply printed and sold the precise book licensed to them by the proprietor, paying a royalty in the usual way. Complainant has succeeded by lawful transfer to whatever rights they had, as well as to the rights of the original proprietor, and since 1858 the book has never been published except under a Merriam license and for the benefit of the Merriams.

(6.) 1830. "*Webster's Primary School and Counting House Dictionary.*"

A book of this title and date was referred to by defendant below, but not produced (*Rec. vol. III*, fols. 7136, 7137). It is evidently the same book described above in (4), and was prepared by and belonged to Noah Webster as proprietor. The sole evidence offered is a library card cataloguing a book under the above title, and naming White, Gallaher & White as publishers of it in 1831. No Webster dictionary was copyrighted under the above

date, which is evidently the mere imprint date. The book was assigned to G. & C. Merriam as stated above in (4).

- (7.) 1833. "*Dictionary for Primary Schools.*" Cover title, "*Webster's Dictionary*".

This was a small book, compiled, copyrighted and owned by Noah Webster, who published it through his licensee, F. J. Huntington & Co. Webster remained proprietor until his death. This book, together with all the other "Huntington Abridgments", was expressly transferred and assigned to G. & C. Merriam by contracts dated respectively 1853 and 1855, which recite that the rights of Huntington had been re-acquired by the Webster heirs. *Rec. vol. I*, p. 675, fol. 1697; "*Webster Contract of 1853*", *Rec. vol. I*, p. 783, *et seq.*, fols. 3129-3176. "*Contract between Heirs and G. & C. Merriam as to Abridged Dictionaries*", *Rec. vol. I*, p. 810, *et seq.*, fols. 3237-3246. This book went out of publication many years ago. Several wholly new abridgments of later editions of the Unabridged Dictionary have been successively prepared by complainant and substituted therefor under the same name and are listed hereafter.

- (8.) 1837 to 1854. "*Webster's Academic Dictionary*"; "*Webster's High School Dictionary*"; "*Webster's University Dictionary*"; "*Webster's Pocket Dictionary*".

No copies of the above dictionaries published between the dates specified have been offered in evidence by either party,—doubtless because none are now in existence or can be found. Complainant offered in evidence, however, certain contracts and assignments by which F. J. Huntington, or F. J. Huntington & Co., or Huntington & Savage, were licensed to publish upon a royalty basis books of the above names belonging to Webster and abridged from Webster's large dictionary. These books all belonged to Noah Webster, or his estate and heirs, who made the books, owned the copyrights and granted the

licenses. These were licenses to publish specific books, — not to make new ones. Every one of these contracts was, with the consent of the Webster interests, specifically assigned to G. & C. Merriam on April 12, 1854. *Rec. vol. I*, pp. 797; 801; 805; fols. 3185-3232.

In addition, these books were affected by the renewal copyright of 1856 upon the large Webster Dictionary of 1828, from which they were abridged. This renewal copyright was sold and assigned to G. & C. Merriam by Webster's children in whom the right of renewal was vested, by the contract of 1853. *Rec. vol. I*, 783, fol. 3129, *et seq.* This was confirmed by the contract of 1855, which contract recites that all rights in the "Huntington Abridgments" had been re-acquired, and specifically confers all rights therein upon G. & C. Merriam. *Rec. vol. I*, p. 810.

These early books of the above titles were supplanted and other abridgments from later editions were substituted therefor under the same names. These later books were published and copyrighted by the Merriams. This has occurred twice, one in the '60s, when the 1864 edition of Webster's Unabridged Dictionary was thus abridged, and again in the '90s, when Webster's International Dictionary was thus abridged. This right to make and substitute new abridgments was expressly granted to the Merriams by the Webster contract (*Rec. vol. I*, fol. 3138).

(9.) 1839. "*Webster's Primary Dictionary.*"

Defendant claimed below that a book of this name was published by White & Sheffield. The book itself was not produced, and the record does not support defendant's claim. The book referred to by the library card in the record at the page indicated (fol. 7132) is the "Octavo Abridgment" of 1829, described above in (5). This book was prepared and owned by Webster and subsequently assigned to G. & C. Merriam.

Webster's primary Dictionary was never issued through White & Sheffield, but was issued through the Huntingtons until it was assigned to the Merriams, as shown above

under (7) and (8). The record shows that in 1839, when defendant claims Webster's Primary Dictionary was being published by White & Sheffield, it was in fact being published by Huntington (*Rec. vol. I*, p. 675).

- (10.) 1840. "*An American Dictionary.*" Cover title, "*Webster's Dictionary*".

This was the second edition of Webster's large or unabridged dictionary, and the last published in his lifetime, or with which he directly had anything to do. It was prepared by Noah Webster himself, and copyrighted and owned by him until his death in the year 1843. Noah Porter of Yale, who revised and edited the 1864 and 1890 editions of this book, says in the preface to the 1890 edition :

"The second edition, 1840, somewhat enlarged and revised by the author, was published by Dr. Webster himself in two volumes, royal octavo; to which a supplement was added in 1843."

The edition with the supplement was published by Webster through J. S. & C. Adams. After Webster's death in 1843, the copyright upon Webster's Unabridged Dictionary was conveyed and assigned to G. & C. Merriam by Webster's executors and heirs. *Rec. vol. I*, p. 676, fol. 2701; p. 725, fol. 2897; p. 793, fol. 2169. This transaction was stated by Noah Porter in his preface to the 1890 edition as follows :

"After the death of Dr. Webster in 1843, the unsold remainder of this edition and the copyright of the work were purchased by George and Charles Merriam, who immediately took measures to prepare and issue a new and revised edition in a single volume in small quarto."

This purchase terminated the connection of J. S. & C. Adams with the work.

- (11.) 1841. "*An American Dictionary.*" Cover title, "*Webster's Dictionary.*"

This was a new edition of the "Octavo Abridgment", the facts and history of which are stated *supra*, under (5).

SUMMARY OF FIRST PERIOD: 1806-1847.

From 1806 to 1847 every dictionary bearing the name Webster came from one common source, had one responsible supervision and authorship, and all were united in one common proprietorship—that of Noah Webster and his heirs and this fact was indicated to the public by the common use of the name Webster upon all these books, which thus became a trade name. The proprietorship of all these books was transferred to G. & C. Merriam by contracts and assignments. *Rec. vol. I*, pp. 783-812; except only the two small books of 1806 and 1807, which died and were forgotten about a century ago.

SECOND PERIOD: 1847-1889.

From 1847 to 1889 the Merriams, and their predecessors in title, compiled and published every dictionary issued under the name of Webster.

Defendant's claim is that during this period fifteen publishers, other than the Merriams, published and sold Webster dictionaries, viz.: (1), Harper & Bros.; (2), White & Sheffield; (3), J. S. & C. Adams; (4), F. J. Huntington & Co.; (5), F. J. Huntington; (6), Huntington & Savage; (7), Mason Bros.; (8), J. B. Lippincott & Co.; (9), Ivison, Blake-man, Taylor & Co.; (10), American Book Company; (11), J. Duffy's Sons & Co.; (12), World Publishing Co.; (13), Ivison, Phinney & Co.; (14), Hurst & Co.; (15), Ward Locke & Co.

The facts are: Eleven out of these fifteen alleged publishers published under the copyrights and licenses of the Merriams and their predecessors, who prepared and owned the books as proprietors. It was the ordinary case of a jobber or retailer using the trade-name or mark of the proprietor upon the genuine goods of such proprietor.

Moreover, there were not fifteen distinct firms, nor fifteen distinct publications issued by them. Several of them are obviously mere successors of each other, continuing the same publications. Thus: (1), F. J. Huntington & Co., and

Huntington & Savage, were the same concern in which F. J. Huntington was merely a partner. (2), So also Ivison, Blakeman & Taylor, and Ivison, Phinney, Blakeman & Co., and the American Book Co. were successors of each other, and handled the same books under the Merriam license and contract. (3), White & Sheffield, Harper & Bro. and J. B. Lippincott & Co., were successive licensees of Webster's "Octavo Abridgment". Adams issued no book during this period. Thus the claimed list of fifteen (15) publishers of "Webster" dictionaries other than the Merriams melts to only seven, of whom three (3) sold only Merriam books. This leaves only four (4) *alleged* outside, or competitive publishers, instead of the fifteen claimed by defendant. As to these four alleged competitive publishers, no books issued by them during this period have been produced, and there is no substantial evidence in regard to them.

The following tabulation includes every dictionary using the name "Webster" shown or claimed to have been published during this period, with a statement of the evidence in regard thereto.

(1.) 1847. "*An American Dictionary.*" Cover title "*Webster's Dictionary*".

This was the third revision and edition of Webster's Unabridged Dictionary. It was prepared by and for G. & C. Merriam, who had purchased the copyright of Webster's Unabridged Dictionary, and was published and copyrighted by and in the name of G. & C. Merriam, who remained its proprietors until the copyright expired in 1889. *Rec. vol. I*, p. 677; pp. 726, 727. See also *preface to Webster's International Dictionary of 1890*. The purchase of this work is recited in the Webster Contract of 1853. *Rec. vol. I*, p. 783, and *especially* p. 793, fols. 3169; 3170. From this time on until after 1889, the Merriams published every unabridged Webster's Dictionary, and the contrary is not even claimed.

This 1847 edition was the first Webster's Dictionary

published and copyrighted in the Merriam name. It was the first Webster's Dictionary not compiled by or under the supervision of Webster himself, or his executors and heirs as Webster's successors. It was compiled and published by the Merriams as the authorized successors and assignees of the original publisher and proprietor of Webster's Unabridged Dictionary.

(2.) *1847 to 1853-4.*

The Webster contract of 1853 shows by recital that the "Octavo Abridgment" of Webster's Dictionary, copyrighted in 1829, and 1841, continued to be published under the Webster copyrights and licenses by Messrs. Harper & Bros. who evidently had succeeded White & Sheffield in handling it. *Rec. vol. I*, fol. 3142. The copyrights covering this book passed to the Merriams under the Webster contracts of 1853 and 1855, subject to the outstanding publishing license. This is the same book, the publishing rights to which the Merriams purchased from J. B. Lippincott & Co. in 1858, to whom the publication had been evidently transferred from the Harpers. The Merriams copyrighted in their own name a new edition of it in 1860, which is the last copyright thereon. The full history of this book has already been given.

It thus appears that this book has always, both before and since 1847, been published and owned by complainant or its predecessors in title. Before 1858 it was published under a Webster's license; after 1858 it was published under a Merriam license. Whatever rights ever existed in it long since passed to the Merriams by lawful transfer. Defendant's contention that Harper continued to publish this book until 1889 (Brief below, p. 180) is utterly baseless. Defendant's statement that "no other publisher except the Harpers is shown to have ever published this edition so that presumably they continued to publish during the copyright period or until 1889" is incorrect. The Lippincott's are shown to have published this book and to have sold their rights to the Merriams, and the Merriams are

shown to have copyrighted an edition of it in 1860, as above stated. No recent copy of the book was produced. The Harper house is still in business in this city, and defendant would have called upon it for proof if any such publication could have been shown.

(3.) 1847-1854.

Until 1854 the "Huntington Abridgments" consisting of "Webster's Academic Dictionary", "Webster's High School Dictionary", "Webster's University Dictionary", and "Webster's Pocket Dictionary", continued to be published under prior Webster copyrights and licenses. These contracts and licenses were specifically assigned and transferred to G. & C. Merriam with the consent of Webster's executors on April 12, 1854, and the Webster Contract of 1855, relating to abridged dictionaries, specifically recites that all rights in these abridgments had been previously re-acquired. *Rec. vol. I*, pp. 797-808; 810. It is thus seen that prior to 1854 these abridged dictionaries were published by complainant's predecessors in title, all rights of every description having been vested in G. & C. Merriam by contract and assignment. Thereafter, these books have been published only under a Merriam license.

(4.) 1856. "*Webster's Academic Dictionary*".

This book was copyrighted by G. & C. Merriam, and a copyright notice in their name dated 1856 appears upon the book. It was a revised edition of a previous book of the same name, copyrighted by Webster's executors in 1850, which from the identity of the name, appears to have been one of the "Huntington Abridgments" assigned to the Merriams in 1854. The Merriams published this book through Mason Brothers, whose name appears in the imprint. The Merriams were the proprietors of the book, as shown by the copyright notice and certificate. *Rec. vol. I*, pp. 678; 733; 736.

- (5.) 1856. "*A Primary School Pronouncing Dictionary.*" Cover title, "*Webster's School Dictionary*".

This book was a revision of Webster's Primary Dictionary of 1833, previously described. It passed to the Merriams under the Webster contracts. It was revised by Webster's son, as stated in its title page and in its preface, and copyrighted by Webster's executors in 1848. A new edition of it was copyrighted in 1856 by G. & C. Merriam, who thereafter published it through Mason Bros., whose name appears in the imprint. The Merriams were the proprietors of the book, as shown by its copyright notice and certificate. *Rec. vol. I*, pp. 681; 724; 737.

- (6.) 1856. "*A High School Dictionary.*" Cover title, "*Webster's High School Dictionary*".

This book was copyrighted by G. & C. Merriam in 1856, and published through Mason Brothers. It was a new edition of one of the "Huntington Abridgments" of the same name, assigned to the Merriams, as already stated, and which was originally published and copyrighted by Webster's executors in 1848. *Rec. vol. I*, pp. 680; 732; 734.

- (7.) 1856. "*An Explanatory and Pronouncing Dictionary.*" Cover title, "*Webster's Counting House and Family Dictionary*".

Copyrighted by G. & C. Merriam and published through Mason Brothers, with both the Mason and Merriam name in the publisher's imprint, and with a Merriam copyright notice. *Rec. vol. I*, p. 679.

- (8.) 1857. "*A High School Pronouncing Dictionary.*" (*Revised Edition.*) Cover title, "*Webster's High School Dictionary*".

Copyrighted by G. & C. Merriam in 1857 and published through Mason Brothers, with both the Mason and Merriam name in the imprint, and with a Merriam copyright notice. *Rec. vol. I*, p. 683.

- (9.) 1858. "*Webster's Royal Octavo Dictionary*"; "*Webster's New University Dictionary*"; "*Webster's Pronouncing Dictionary*"; "*Webster's Primary School Dictionary*"; "*An Abridgment of the Quarto Edition of Webster's Dictionary*".

Defendant contended below that J. B. Lippincott & Company "published" the above named or described dictionaries, and that, therefore, complainant and its predecessors were not the *sole* publishers of Webster's Dictionaries during this period. Thus defendant said (Brief below, p. 183):

"The period of the Lippincott's use of the name 'Webster' extensively certainly covers twenty years, and, if the last two books above mentioned continued to be published as aforesaid, covers thirty-three years, of the period of forty-two years during which Judge Colt found that the complainant was the sole publisher using that name. The Lippincott's right to use the name 'Webster' as the title of a dictionary published by them was, during twenty years or more, expressly recognized by the complainant".

This is absolutely incorrect, and contrary to the uncontroverted facts shown by the record.

"Webster's Royal Octavo Dictionary" is the book known as the "Octavo Abridgment" which was first copyrighted by Webster in 1829; revised and again copyrighted by Webster in 1841, and the original copyright of which was renewed by Webster's children in 1857. The History of this book has already been given. (See *First Period*, No. (5), *supra*. See also *copies of three Editions of this Book*.)

Lippincotts' rights in this book were specifically assigned to G. & C. Merriam by the Lippincotts in 1858, and the contract and assignment appears in full in the record. (*Rec. vol. I*, pp. 795, 796.) The recitals in this contract show that the Webster heirs were the proprietors of this book under the renewal copyright, and that as such proprietors they had granted the Lippincotts an exclusive license to publish this book for the term of such renewal

copyrights, viz. : fourteen years from 1857, (*i. e.* until 1871) upon a royalty basis. The Lippincotts by this contract assigned all their rights to G. & C. Merriam, together with the stereotype plates of the book, the Merriams assuming the royalty payments to the Webster heirs and paying to the Lippincotts \$50,000 in addition. The Merriams then, in turn, licensed the Lippincotts to continue this publication until 1871 upon a royalty of 75c per copy to be paid by the Lippincotts to the Merriams for every copy sold. *Rec. vol. I*, p. 795.

1860 the Merriams copyrighted a new edition of this book and continued to publish it and sell it through the Lippincotts until 1876.

These books so sold by the Lippincotts under the Merriam license bear notices of the Merriam and Webster copyrights (*Rec. vol. I*, p. 685). All this was in the record before Judge Colt in the Ogilvie case. As a matter of fact, the copy of this contract offered and received in evidence was a printed copy cut from the Ogilvie record. These facts support Judge Colt's finding that complainant (including its predecessors in title) was the sole publisher of Webster dictionaries during this period. The Lippincotts neither compiled nor ever revised or copyrighted either this book or any other Webster Dictionary. Webster and his heirs were the proprietors of this book, until it was transferred to the Merriams. The Lippincotts also may be considered one of complainant's predecessors in its chain of title. This book was not an outside or competitive book. It came from the common source of all previous Webster Dictionaries, and passed to the Merriams by lawful transfer during the life of its copyright. It was no exception to the rule that the name "Webster" upon a dictionary indicated one common source, one responsible supervision and one common proprietorship during the whole of this period.

"Webster's New University Dictionary", and the so-called "Webster's Pronouncing Dictionary" were not produced in evidence and cannot be definitely identified. The

"New University" was simply referred to in the Lippincott contract of 1858, and was assigned to the Merriams along with the "Octavo Abridgment", so that what is said above as to that book applies also to the "New University". The name "New University" was not a copyright or formal title of a book, but seems to have been merely a familiar name used at that time to designate one of the Webster's abridgments. (See *Rec. vol. I*, p. 785, fol. 3139. "The University Abridgment so-called"). This book is probably the same book which defendant referred to above as "Webster's Pronouncing Dictionary". No use of this latter title is shown anywhere in the record. The library card to which defendant refers (*Rec. vol. III*, p. 1780) merely refers to "A Pronouncing and Defining Dictionary of the English Language Abridged from Webster's American Dictionary", etc. In every probability this was the book assigned in 1858 by the Lippincotts to Merriam under the designation of "The New University".

"Webster's Primary School Dictionary", and "An Abridgment of the Quarto Edition";—Defendant stated below in its brief (p. 183):—

"The Lippincotts also began to publish in 1867 an abridgment of the quarto edition of Webster's Dictionary, and in 1868 a Webster's Primary School Dictionary, the rights of which do not appear to have ever been assigned, and which, therefore, presumably continued during the copyright period, viz., till 1909 and 1910."

This statement is wholly incorrect, and there is not anything in the record which supports it. No evidence from Lippincotts was offered. No copy of such books was produced.

The facts are that the so-called "Abridgment of the Quarto Edition of Webster's Dictionary", which defendant said the Lippincotts were publishing in 1867, and which is referred to in the record (*vol. III*, fol. 7121) is the "Octavo Abridgment" above described, and which was assigned to the Merriams. Lippincott was selling it under a Merriam license, and paying royalties to the Merriams.

The title page of the book referred to by the defendant is the same title page that appears in the several editions of this book and fully identifies it. (See also *Title Page printed in Rec. vol. I, p. 685.*)

The Webster's Primary School Dictionary, which defendant says Lippincott began to publish in 1868, was the book published and copyrighted by that name by G. & C. Merriam in the year 1867. The Merriams published this book with their own and several other names in the imprint, to wit, Ivison Blakeman Taylor & Co., J. P. Lippincott & Co., Wilson Hinkle & Co., and G. & C. Merriam. *Rec. vol. I, p. 687; vol. III, p. 1781, fol. 7183.*

This book was, as its title shows, abridged from the Merriam's 1864 revision of Webster's Unabridged Dictionary. The Merriams were the proprietors and publishers of it. Lippincott was a mere licensed distributor of it. Later the Merriams handled this book through the American Book Company, still remaining themselves the proprietors and publishers of it. *Rec. vol. I, p. 704.*

(10.) 1859. "*An American Dictionary.*" Cover title, "*Webster's Dictionary Unabridged*".

This was a republication of the Merriam's previous edition of 1847, with added supplemental matter and pictorial illustrations. It was published by the Merriams with their name in the imprint, and was copyrighted by G. & C. Merriam. It contained notices of copyright by Noah Webster dated 1840; by G. & C. Merriam, dated 1847; by Webster's children, dated 1856, which was the renewal copyright sold and assigned to the Merriams; and by G. & C. Merriam, dated 1859. *Rec. vol. I, p. 684.*

(11.) 1863. "*The Army & Navy Pocket Dictionary.*" Cover title, "*Webster's Army & Navy Dictionary*".

This book was published and copyrighted by G. & C. Merriam in 1863, and revised editions of it were published

and copyrighted by G. & C. Merriam in 1864, and again in 1867. The 1867 edition bore the following names in the publisher's imprint: Ivison Phinney Blakeman & Co.; J. B. Lippincott & Co.; Sargent Wilson & Hinkle; S. C. Griggs & Co.; G. & C. Merriam. The book bore three copyright notices in the Merriam name, dated 1863, 1864 and 1867, and the Merriams were its proprietors. *Rev. vol. I, pp. 689, 738.*

(12.) 1864. "*An American Dictionary.*" *Cover title, "Webster's Dictionary Unabridged."*

This was the fourth revised edition of Webster's Unabridged Dictionary. It was the famous "Webster's Unabridged" so widely and favorably known from 1864 to 1890, when it was succeeded by Webster's International Dictionary. It was revised and prepared by and under the direction of G. & C. Merriam, the work being done for them by Chauncy A. Goodrich and Noah Porter, both of Yale. It was published by the Merriams with their name in the imprint and was copyrighted by them. It contained notices of copyright as follows: Three notices of copyrights by G. & C. Merriam, dated respectively 1864, 1865 and 1867; a notice of copyright by Webster's children dated 1856, which was the renewal of the 1828 copyright; also a notice of copyright by Noah Webster dated 1840. The Merriams were at all times proprietors of this book. *Rev. vol. I, pp. 686; 738.*

(13.) 1867. "*A Primary School Dictionary.*" *Cover title, "Webster's Primary Dictionary."*

This book was published and copyrighted by G. & C. Merriam in 1867. It was abridged from the Merriam's 1864 edition of Webster's Unabridged Dictionary. It was sold with the following names in the imprint:—Ivison, Blakeman Taylor & Co.; J. B. Lippincott & Co.; Wilson, Hinkle & Co.; G. & C. Merriam. The Merriams were the proprietors, and the other concerns named were merely licensed distributors of it. *Rev. vol. I, pp. 687, 745.*

- (14.) 1867. *Academic Edition*. "*A Dictionary of the English Language*." Cover title, "*Webster's Academic Dictionary*".

The book was abridged from the Merriam's 1864 edition of Webster's Unabridged Dictionary, and was published and copyrighted by the Merriam's in 1867, with notice of the Merriam copyright, and with names of both the American Book Company and G. & C. Merriam & Co. in the imprint. *Rec. vol. I*, pp. 688, 742.

- (15.) 1867. "*A Common School Dictionary*." Cover title, "*Webster's Common School Dictionary*".

This book was abridged from the Merriam's 1864 edition of Webster's Unabridged Dictionary, and was copyrighted and owned by G. & C. Merriam. *Rec. vol. I*, p. 745.

- (16.) 1867. Cover title, "*Webster's People's Dictionary*".

This book was revised and abridged from the Merriams Webster's Unabridged Dictionary of 1864, and was published, copyrighted and owned by the Merriams with the Merriam name in the publisher's imprint and in the copyright notice. *Rec. vol. I*, p. 690.

- (17.) 1867. "*Counting House Edition*." Cover title, "*Webster's New Counting House and Family Dictionary*".

This was abridged from the Merriam's Webster's Unabridged Dictionary of 1864, and was copyrighted by the Merriams and published by them, with the names of Ivison, Blakeman, Taylor & Co.; G. & C. Merriam and Van Antwerp Bragg & Co. in the imprint. It was prepared and owned by the Merriams. *Rec. vol. I*, pp. 691, 741.

- (18.) 1868. "*A High School Dictionary.*" Cover title, "*Webster's High School Dictionary. Revised Edition*".

This was abridged from the Merriam's Webster's Unabridged Dictionary and was published and copyrighted by the Merriams, with the names of Ivison, Blakeman, Taylor & Co., G. & C. Merriam, and Van Antwerp Bragg & Co. in the imprint. It was a Merriam book. *Rec. vol. I*, pp. 692, 742.

- (19.) 1869. "*A Pocket Dictionary.*" Cover title, "*Webster's Pocket Dictionary*".

Abridged from Webster's Unabridged Dictionary. Published and copyrighted by G. & C. Merriam, and issued with the names of Ivison, Blakeman, Taylor & Co. and G. & C. Merriam in the imprint. Always a Merriam book. *Rec. vol. I*, pp. 693, 743.

- (20.) 1877. "*Webster's Handy Dictionary.*" Cover title, "*Webster's Handy Dictionary*".

Abridged by the Merriams from their 1864 edition of Webster's Unabridged Dictionary. Copyrighted and owned by G. & C. Merriam. Published by G. & C. Merriam with the names American Book Co. and G. & C. Merriam in the imprint. Always a Merriam book. *Rec. vol. I*, pp. 694, 747.

- (21.) 1879. "*An American Dictionary. New Edition with Supplement.*" Cover title, "*Webster's Unabridged Dictionary*".

This was a republication of the Merriam 1864 edition with an appendix and supplement. It was published and copyrighted by G. & C. Merriam, and bore the Merriam name in the imprint, and notice of the Merriam copyrights dated respectively, 1879, 1875, 1864, 1859, 1847, and of the renewal copyright by Webster's children dated 1856, which had been transferred to the Merriams. Always a Merriam book. *Rec. vol. I*, pp. 695; 748, 749.

- (22.) 1884. "*An American Dictionary. Subscription Edition with Historical Supplement.*" Cover title, "*Webster's Unabridged Dictionary.*"

A new edition, with supplementary matter, of the Merriam's 1864 edition of Webster's Unabridged Dictionary. It was published and copyrighted by the Merriams, with notice of Merriam copyrights dated 1884, 1882, 1879, 1875, 1864, 1859 and 1847. *Rec. vol. I*, pp. 698; 752, 753; 757.

- (23.) 1884. "*National Pictorial Edition with Supplement.*" Cover title, "*Webster's National Pictorial Dictionary.*"

Abridged from the Merriam's Webster's Unabridged Dictionary. Published and copyrighted by the Merriams, with notices of Merriam copyrights dated 1884 and 1867. *Rec. vol. I*, p. 699.

- (24.) 1881. "*Webster's Condensed Dictionary.*"

This book was abridged from the Merriam's Webster's Unabridged Dictionary of 1864, and was published and copyrighted by the Merriams, and sold with the names Ivison, Blakeman, Taylor & Co. and G. & C. Merriam & Co. in the imprint. *Rec. vol. I*, pp. 700; 756.

- (25.) 1884. "*Webster's Practical Dictionary.*"

Abridged from the Merriam's Webster's Unabridged Dictionary of 1864. Published and copyrighted by the Merriams and sold with the names of Ivison, Blakeman, Taylor & Co. and G. & C. Merriam & Co. in the imprint. *Rec. vol. I*, pp. 696; 755.

- (26.) 1886. "*Subscription Edition with Compendium.*" Cover title, "*Webster's National Pictorial Dictionary. Subscription Edition.*"

Abridged from Webster's Unabridged Dictionary of 1864 and constituting a new edition of the previous book of the same name above described under (23). Pub-

lished and copyrighted by G. & C. Merriam & Co. and bearing the Merriam name in the imprint and notices of Merriam copyrights dated 1886, 1884 and 1864. *Rec. vol. I*, pp. 701; 758.

RECAPITULATION.

Every Webster dictionary published in the period from 1847 to 1889, was a Merriam book, was issued under a Merriam copyright, and was published either by the Merriams directly or through a licensee. The "Octavo Abridgment" (*supra* (2) and (9), and the "Huntington Abridgments" (*supra* (3), were originally issued under a Webster copyright and license, and both the copyrights and the license contracts were assigned to the Merriams in 1853, 1854 and 1858. Instead of there being any independent or outside publishers of Webster dictionaries during this period there were merely licensees selling the books of one common proprietor, that proprietor being the Merriams.

Judge Colt's finding in the Ogilvie case that the Merriams were the *sole* publishers of Webster dictionaries between 1847 and 1889, and that at that time the name "Webster" had acquired a secondary meaning, was based upon the foregoing facts, and in view of them no other finding was possible.

THE ALLEGED COMPETITIVE PUBLISHERS.

The contention that licensees, such as Lippincott, American Book Co., etc., were competitive publishers of Webster's dictionaries is untenable, but it misled Judge Hand.

The other four alleged competitive publishers of Webster dictionaries during this period, as claimed by defendant, are (1), J. Duffy's Sons & Co.; (2), Ward, Locke & Co.; (3), Hurst & Co.; and (4), World Publishing Co. The evidence in regard to these alleged publications is as follows:

(1.) *J. Duffy's Sons & Co.*

The sole reference in the record to any publication by this concern is an index-card purporting to show that

there is in the Library of Congress a book, entitled as follows:

"A critical pronouncing dictionary of the English language, New and improved ed. By Noah Webster, LL.D. Cor. and improved, by James W. Kavanagh. Dublin, J. Duffy, Sons & Co., 1872."

That is absolutely all there is in the record. There is no evidence that the book was ever circulated or sold in the United States. No copy of it was produced in evidence, and it was not even seen by the witness who produced the Index-Card. Such a foreign publication, if there was one, can have no effect in this case. (*Rec. vol. III, fol. 7237.*)

(2.) *Ward, Locke & Co.*

A single witness testified that some time "about 1885 to 1890" a Chicago retailer called Revell Company sold several small dictionaries entitled "Webster's Dictionary," published by Ward, Locke & Co. of London, and imported. The witness could not approximate how many such books were sold by this concern, but said it was "certainly hundreds." He could not say when, or by whom, they were imported. He could not say when he had last seen a copy of any of them. He could not, and did not, produce a copy of any of the books. They are not listed in American catalogues. He did not know what, if any, connection there was between them and any book written by Noah Webster. He could not say how long they were on sale by this concern. The only thing he affirmatively undertook to state was that some copies of such books were imported and sold; that they were small books retailed at from 25c. to \$1.25. This is absolutely all the record contains as to these books. No other witness referred to them. They were not published, and apparently are not known in this country. (*Rec. vol. III, fols. 4772, 4773: 4794-4799.*)

Certainly this testimony does not rebut the fact, and Judge Colt's finding, that the complainant and its predecessors were the sole publishers of Webster dictionaries in this country during this entire period. If such importation and sale took place it was at most an insignificant and unknown infringement upon complainant's trade rights.

(3.) *Hurst & Company.*

The book produced to prove this publication was printed and published in the year 1912. This book bears copyright notices dated 1879 and 1882, but *at that time it was not entitled, "Webster's Dictionary"*, and it nowhere appears at what date the name "Webster" was adopted and used in connection with it. This book was successively published and copyrighted by Hurst under the following titles:—

"American Diamond Pronouncing Dictionary"; copyrighted 1878;

"The American Popular Dictionary", publishing date, 1882; copyright dates, 1879 and 1882;

"Hansell's Practical Illustrated Pronouncing Pocket Dictionary", publishing date, 1886; copyright date, 1886;

"The Handy Reliable Dictionary", copyright date, 1891.

It thus appears that *at least until after 1891* this book was not published as a Webster Dictionary. All of the above named dictionaries are apparently printed from the same, or a duplicate set of plates, and are the same book, notwithstanding their variously printed names. The books are here as exhibits and may be examined and compared. *Rec. vol. I*, pp. 666, 667; also *vol. III*, pp. 1817, 1819.

Defendant quoted the witness Ogilvie as testifying that this book had a "large sale in the "seventies", and referred to folio 7115 of the Record. Ogilvie did not so testify. He testified merely that "it must have had a very large sale", and he did not say when, but evidently meant down to the date of his testimony. He also did not say under what name or title this book had enjoyed such large sale. He testified that the title might or might not have been changed, and that the practice of changing titles for the same book had been indulged in by many publishers (*Rec. vol. III*, fol. 7275). He also testified that he did not know, and could not fix the date of the first use of the name "Webster" upon this book, and did not do so *Rec. vol. III*,

fol. 7263, 7282). Another witness, however, fixed the date as being in the "*early nineties*" (*Leon vol. III*, fol. 5001).

It is thus conclusively seen that during the period under consideration, this book was not published as a Webster's dictionary, and did not assume that name until after 1891, *i. e.*, in the early "nineties". It therefore does not rebut complainant's exclusive use of the name until after 1889, as found by Judge Colt.

(4.) *World Publishing Company.*

A single witness testified that a small book named Webster's Dictionary was published by a concern called the "World Publishing Company" "in the eighties". He could not fix the date. The book was given away for premium purposes, "probably off and on for two or three years". The book was not produced and nothing further was shown as to its nature, or character, or its exact title. He further testified that the World Publishing Company was out of business, and that he did not know what had become of the book. He could not say that the book was in the market today. That is all this witness knew about this book. (*Rec. vol. II*, fol. 5190-5192; 5569-5574.) No other witness appears ever to have heard of it, though book catalogues and library indexes have been ransacked by witnesses for defendant and their contents recited in evidence. The book may have been a genuine authentic Webster's dictionary, and entitled to bear the name, or it may have been an infringement. Nothing is shown or known about it. It was insignificant at most.

SUMMARY OF SECOND PERIOD: 1847-1889.

Complainant and its predecessors in title were the sole publishers and proprietors of Webster dictionaries during this entire period. *They had no competitors.* They had only licensees, who paid for the privilege of selling the complainant's book. Upon no conceivable theory can such *licensees* be termed "competitors". Complainant had licensees, but no competitors, down to 1889.

THIRD PERIOD:—1889 TO DATE.

A.

MERRIAM PUBLICATIONS SINCE 1889.

Without cessation, the Merriams continued, and now continue, to publish and revise their series of established Webster dictionaries, as follows:

(1.) 1890. "*Webster's International Dictionary.*"

This was the fifth regular and successive new and revised edition of Webster's Unabridged Dictionary. It was described on its title page as follows:

"Being the authentic edition of Webster's Unabridged Dictionary, comprising the issues of 1864, 1870 and 1884, now thoroughly revised and enlarged under the supervision of Noah Porter, D.D., LL.D. of Yale University".

The history of the making of this dictionary under the Merriam direction and control is set forth in its preface by Noah Porter. This book was published and copyrighted by G. & C. Merriam & Co., with their name in the imprint, and with notices of Merriam copyrights dated 1890, 1884, 1879 and 1864 (*Rec. vol. I*, pp. 702; 759; 760). The testimony is that the great reputation and authority of Webster's dictionary rests mainly upon this edition and its immediate predecessors, all published and owned by the Merriams. *Rec. vol. I*, fols. 1337; 1567; 1873-4; 1830; 1891; 2000.

(2.) 1892. "*Webster's High School Dictionary.*"

Abridged from Webster's International Dictionary. Prepared, copyrighted, owned and published by G. & C. Merriam Co., and published with the names American Book Company and G. & C. Merriam Co. in the imprint, and with notice of the Merriam copyright. *Rec. vol. I*, pp. 703, 762.

(3.) 1892. "*Webster's Primary School Dictionary.*"

Abridged from Webster's International Dictionary. Prepared, copyrighted and owned by G. & C. Merriam

Co. Published and sold with the names American Book Company and G. & C. Merriam Co. in the imprint. *Rec. vol. I*, pp. 704, 763.

(4.) 1892. "*Webster's Common School Dictionary.*"

Abridged from Webster's International Dictionary. Prepared, published, copyrighted and owned by G. & C. Merriam Co. Published with the names American Book Company and G. & C. Merriam Co. in the imprint, and with notice of the Merriam copyright. *Rec. vol. I*, pp. 705, 762.

(5.) 1895. "*Webster's Academic Dictionary.*"

Abridged from Webster's International Dictionary. Prepared, published, copyrighted and owned by G. & C. Merriam Co. Published and sold with the names American Book Company and G. & C. Merriam Co. in the imprint, and with notice of the Merriam copyright. *Rec. vol. I*, pp. 706, 764.

This book supplanted the previous Merriam abridgment of the same name, abridged from the 1864 edition and copyrighted in 1867, which in its turn had supplanted a previous book of the same name abridged from the 1840 edition and published by Webster through the Huntingtons, and sold and assigned to the Merriams, as already stated.

(6.) 1896. "*Webster's Counting House Dictionary.*"

Abridged from Webster's International Dictionary. Published and copyrighted by G. & C. Merriam Co. with the names American Book Company and G. & C. Merriam Co. in the imprint, and notice of the Merriam copyrights dated 1896 and 1895. Also bearing the Merriam's registered trade-mark. *Rec. vol. I*, pp. 707, 765.

(7.) 1898. "*Webster's Collegiate Dictionary.*"

Abridged from Webster's International Dictionary. Compiled, published, copyrighted and owned by G. & C.

Merriam Co. Published with the Merriam's registered trade-mark and the Merriam name in the imprint, and notice of the Merriam copyright. *Rec. vol. I*, pp. 709, 765.

(8.) 1898. "*Australasian Edition. Webster's International Dictionary.*"

This was the Merriam's Webster's International Dictionary of 1890, with a voluminous appendix and an Australasian supplement. Copyrighted, published and owned by G. & C. Merriam Co. *Rec. vol. I*, p. 766.

(9.) 1898. "*Historical Supplement to Webster's International Dictionary.*"

Copyrighted and owned by G. & C. Merriam Co. *Rec. vol. I*, p. 767.

(10.) 1900. "*New Edition with Supplement.*" Cover title, "*Webster's International Dictionary*".

This was a new edition of the 1890 edition of Webster's Unabridged Dictionary, with a new supplement of 25,000 words. Published and copyrighted by G. & C. Merriam Co., bearing the Merriam registered trade-mark and with the Merriam name in the imprint, and notices of the Merriam copyrights dated 1900, 1890, 1884, 1879, and 1864. *Rec. vol. I*, pp. 710, 768.

(11.) 1903. "*Webster's Unabridged Dictionary.*"

This was a new edition of the Merriam's Webster's Unabridged Dictionary of 1864, with an appendix and supplement. Copyrighted and published by G. & C. Merriam Co. Imprint, "Published for the Trade". Notices of Merriam copyrights dated 1864, 1879 and 1903. Also notice of renewal of the 1864 copyright dated 1892. *Rec. vol. I*, pp. 711, 770.

(12.) 1905. "*Webster's Little Gem Dictionary.*"

Abridged from Webster's International Dictionary. Compiled, published and copyrighted by G. & C. Merriam

Co., bearing the Merriam registered trade-mark and notice of the Merriam copyright, and with the Merriam name in the imprint. *Rec. vol. I*, pp. 712; 771.

(13.) 1905. "*Australasian Edition. Webster's International Dictionary.*"

This was the Merriam's Webster's International Dictionary of 1890, with an additional appendix. Published and copyrighted by G. & C. Merriam Co. *Rec. vol. I*, p. 772.

(14.) 1906. "*Webster's Condensed Dictionary.*"

Published and copyrighted by G. & C. Merriam Co., with notices of Merriam copyrights dated 1884 and 1906, and with the Merriam registered trade-mark. Names in imprint: The Reilly & Britton Co. and G. & C. Merriam Co. (*Rec. vol. I*, pp. 713; 774).

This was a new and revised edition of a previous edition of the same book under the same name, published and copyrighted by the Merriams in 1884, which book was based on the Merriam's 1864 edition of the unabridged dictionary of Noah Webster. Reilly & Britton Co. are mere licensees. *Rec. vol. I*, pp. 591, 592, 596, 597, 635.

(15.) 1906. "*Webster's Practical Dictionary.*"

Published and copyrighted by the Merriams and published with the Merriam registered trade-mark, and with the names Reilly & Britton Co. and G. & C. Merriam Co. in the imprint, and notices of the Merriam copyrights dated 1884 and 1906. This book was a new edition of the 1884 edition of the same title, which was based on the Merriam's 1864 edition of Webster's Unabridged Dictionary. *Rec. vol. I*, pp. 714; 773; 775.

(16.) 1909. "*Webster's New International Dictionary.*"

This was the sixth regular and successive new and revised edition of Webster's Unabridged Dictionary. It

was based on Webster's International Dictionary of 1890 and 1900, and completely revised. It was published and copyrighted by G. & C. Merriam Co. and bears the Merriam registered trade-mark and notice of the Merriam copyright. *Rec. vol. I*, pp. 715; 776.

(17.) 1909. "*Webster's Condensed Dictionary.*"

A new edition of the 1884 and 1906 editions of the same book under the same name already described. Published and copyrighted by G. & C. Merriam Co., with the names Reilly & Britton Co. and G. & C. Merriam Co. in the imprint. Also bearing the Merriam registered trade-mark. *Rec. vol. I*, pp. 716; 777.

(18.) 1910. "*Webster's Collegiate Dictionary.*"

A new edition of the Merriam's Webster's Collegiate Dictionary of 1898, with a supplement of additional words and meanings. Abridged from Webster's International Dictionary. Copyrighted and published by G. & C. Merriam Co. with the Merriam trade-mark and the Merriam name in the imprint. *Rec. vol. I*, pp. 717; 780.

(19.) 1910. "*Webster's Practical Dictionary.*"

A new edition of the editions of 1884 and 1906 of the same book under the same name described above. Published and copyrighted by G. & C. Merriam Co. Bearing the Merriam trade-mark and the names Reilly & Britton Co. and G. & C. Merriam Co. in the imprint, and notices of the Merriam copyrights dated 1884, 1906 and 1910. *Rec. vol. I*, pp. 718; 780.

(20.) 1911. "*Webster's Little Gem Dictionary.*"

Abridged from Webster's International Dictionary. This was a revised edition of a previous book of the same name described above. It was published and copyrighted by G. & C. Merriam Co. with the Merriam registered trade-mark and the Merriam name in the imprint, and with notice of the Merriam copyright dated 1911. *Rec. vol. I*, pp. 719; 781.

COMPETITIVE UNABRIDGED DICTIONARIES.

Although the copyright on the first Webster's dictionary expired in 1834, and the copyright upon the first Webster's Unabridged Dictionary (1828 Ed.), expired in 1870, complainant and its predecessors continued to be the sole makers and proprietors of Webster dictionaries until after the copyright had expired in 1889 upon the Merriam's 1847 Edition of Webster's Unabridged dictionary. Since 1889 the Merriams have continued to publish and sell their said series of Webster dictionaries, and to issue new and revised editions thereof, without cessation or break.

Beginning about the year 1890, several publishers have since issued and sold in cheap form a photographic reprint of Webster's Unabridged Dictionary of 1847. No copies of these reprints referred to by defendant's witnesses were produced in evidence. One copy was stipulated as an exhibit. (*Rec. vol. III*, p. 1828). These reprint editions were, in fact, genuine copies of Webster's dictionary, though of an obsolete edition. It must be presumed that the publishers of these reprints refrained from fraud, kept within their legal rights, and distinguished their books from complainant's books, and if so, there is nothing in the publication of these reprint editions which could possibly affect the secondary meaning of the name "Webster", as indicating the dictionaries published by complainant. Some of these reprints, however, were published in such form as to be readily mistaken for the complainant's later revised and copyrighted editions of the same book, as shown by the early "*Webster Dictionary case*" which granted relief to complainant. *Merriam v. Texas Sifting Co.*, 49 Fed. 944; *Merriam v. Famous Shoe Co.*, 47 Fed. 411; *Merriam v. Holloway Co.*, 43 Fed. 450.

The defendant has shown the mere fact of the existence in the market of these reprint editions bearing the name "Webster". To the extent (not shown by the evidence) that these dictionaries have not been adequately distinguished from complainant's dictionaries, they have been in-

infringements upon the complainant's rights; but it has not been shown by any evidence that they have yet diminished the trade significance and secondary meaning of the name "Webster". Judge Colt expressly so found, notwithstanding the fact that these reprint editions were specifically called to his attention. *Ogden v. Morrison*, 122 F.2d 624.

Only one competitive large or undridged dictionary, other than mere reprints, has been issued by any one at any time. This is the so-called Webster's Imperial Dictionary, published in 1924, which was the subject matter of the Ogden suit before Judge Colt in the First Circuit, and of the Suffolk suit in the Sixth Circuit. This book was a revised edition of the Merriam's 1897 edition. The use of the name "Webster" therein was required unless accompanied by a prescribed explanatory statement which those courts deemed sufficient to prevent deception. Under these circumstances the publication of the Ogden or Suffolk dictionary cannot in any way prejudice complainant's rights.

It may be added that the Ogden Dictionary has borne a variety of names, such as "Webster's Imperial Dictionary", "Webster's Universal Dictionary", "Webster's Monarch Dictionary", "Webster's Comprehensive Dictionary", etc. These are but different names given to the same book. *See, vol. III, cols. 7256-7257.*

It is abundantly shown, without even any attempted contradiction, that the great reputation and goodwill of Webster's Dictionary today is attached to the recent books which the Merriams publish, and not at all to either the obsolete reprints or the Ogden revision of the obsolete and expired book. *See, vol. I, cols. 1225, 1237, 1239, 1272-1274, 1291, 2000.*

Judge Hand said in his opinion below, that if these books were truly described as "one of the original Webster's dictionaries", this fact "would probably destroy any possibility of its sale" (*See, vol. III, p. 2022, 1st. 1292*). This can only mean that these books will become they

deceive the public and trade upon the reputation of later copyrighted Webster dictionaries prepared and published by the complainant, and with which they have neither a literary nor a commercial connection.

C.

COMPETITIVE SMALL DICTIONARIES.

The actual evidence in the record of small dictionaries published under the name Webster is extremely meager. It consists of some twenty-five volumes filed as exhibits. All of these exhibits were purchased in the year 1912. Most of them have very recent dates in the imprint and in the copyright notices. No evidence was offered as to the date when the books were first published, or as to the date when the name Webster was first used thereon. This is a very significant omission, for it appears from a comparison of the dictionary exhibits before the Court:

First, that many of these books were originally published under other titles, and not under the name Webster's; and

Second, that many of these books are the same identical work concurrently sold by various concerns under different names. *Rec. vol. I*, pp. 664-669; *Rec. vol. III*, pp. 1833-1837; See also the *Exhibits* themselves.

The copyright date upon the book does not prove that the name Webster was in the title at that time, because it appears that such titles were frequently changed. The copyright certificates which would have shown with certainty what was the fact, were not produced.

The sole fact proved by these exhibits is that in the year 1912 these books were sold under the name Webster. That is *their full net value as evidence*.

As will be pointed out, many of these books are simply frauds. None of them are of any literary importance, or have any authority or reputation of their own. (*Rec. fols. 1960, 1454-1457, 1561, 1868, 1876, 1332-1337, 1999-2002, 1829, 1897-8.*) They are literary flotsam and jetsam which has been seized by unscrupulous publishers and passed off

as "Webster's" dictionaries, without a shadow of justification or excuse.

Incompetent evidence was offered through several witnesses who stated over complainant's objection that books bearing specified titles had been published by specified publishers, or that they were so listed in book catalogues. These books were not produced and identified, and no dates were fixed. This testimony was mainly given by the hostile Ogilvie, whom the Merriams had convicted of fraud, and whose books and advertisements they had enjoined (*Rec. fols. 7102-7156*). The president of defendant Cupples & Leon Co. gave similar testimony, (*Rec. fols. 4994-5001*). Both of these witnesses are greatly biased. The comments of the Boston Courts on Ogilvie deprived his testimony of any weight. Judge Hand commented severely upon Leon's testimony, pronouncing it "very unsatisfactory", and finding that his claims and advertisements were not justified or warranted by the facts (*Rec. vol. III, p. 2070, fols. 8277-8*).

The testimony of these and other like witnesses as to the contents of printed books which should have been, but were not produced, is hearsay and secondary evidence. It was duly objected to as incompetent upon this ground, and because it was not shown whether or not these publishers had conformed to the limitations upon their rights. *Rec. vol. II, p. 1249, fol. 4995; Rec. vol. III, p. 1776, fol. 7103*. The Court is asked to disregard this line of testimony. It is an injustice to consider it, because complainant was deprived of the opportunity to make any effective cross-examination. In the absence of the books referred to by the witnesses, many of which counsel had never heard of before, complainant was unable to show : (1), that many of such books were the same identical book with merely the name changed, thus cutting down the number of distinct books and publishers using the name ; (2), that such books were small, ephemeral publications,—many mere vest-pocket word lists, of no literary merit or reputation ; (3), that many of them were mere fraud books, originally published under some name

other than Webster; (4), the actual date when the name Webster was first used on such books; (5), whether or not such books were in fact reprints of expired Webster dictionaries, and thus entitled to use that name, within legal limitations; and (6), whether or not such books, in title page and cover inscriptions, conformed to such limitations. None of these facts anywhere appear.

The embargo placed on any effective cross-examination by this failure to produce the books referred to, is well illustrated by the witness Ogilvie. He testified freely on direct-examination as to a long list of alleged Webster dictionaries not published by the Merriams, but on cross-examination he refused to answer without the books. For example:

" x-Q. 190. Did you know as a matter of fact that the book which Ivison, Blakeman, Taylor & Co. published under the name of Webster's Handy Dictionary was a book belonging to the Merriam Co.? A. I have never seen the book; therefore know nothing about it" (*Rec. vol. III, fol. 7250*).

" x-Q. 200. Under how many names has your book 'Webster's Imperial Dictionary' been published? A. I think the book is the best evidence of that fact.

" x-Q. 201. It has been published under each of the following names, has it not: Webster's Imperial Dictionary, Webster's Universal Dictionary, Webster's New Cosmopolitan Dictionary, Webster's Monarch Dictionary, Clarkson's Dictionary? A. You haven't given the whole list. There are some things even you don't know about that.

" x-Q. 202. It has, however, been published under the names mentioned? A. I have seen copies of the books published under some of those titles, but not all of them.

" x-Q. 203. What is your best knowledge, information and belief as to whether it has been published under all of them? A. The books are the best evidence.

" x-Q. 204. What is your best knowledge, information and belief on that subject? A. I repeat, the books are the best evidence.

" x-Q. 205. Question repeated? A. Answer the same.

" x-Q. 206. What other names do you believe that book has been published under? A. The books are the best evidence.

" x-Q. 207. What other names, please? A. Same answer.

" x-Q. 208. *I cannot find the books, without the names.* Please give the names? A. You know enough. The same answer.

" x-Q. 209. That is the only answer you will make? A. That is the only one.

" x-Q. 210. How many other names? A. The books are the best evidence.

" x-Q. 212. Then you won't assist the Court in arriving at the truth by giving such information as you can? (No answer.)

" x-Q. 213. Please answer the question. A. I have answered it.

" x-Q. 214. When did you say the name 'Webster' was first used on the Hurst book? A. I didn't say.

" x-Q. 215. When was it? A. I don't know.

" x-Q. 222. A. If that is true, the book is the best evidence of the fact.

" x-Q. 230. I didn't ask you that. I asked you if you ever knew of that book under any other name, of which Webster did not form a part? A. If I did, I have forgotten it. I have not attempted to keep track of any of these changes in titles or the books involved in the litigation. *You cannot get me to make any definite statement in regard to it, unless I have the books right before me to refer to.*" *Rec. vol. III, pp. 1815-1820, fols. 7259-7624; 7267; 7270.*

Obviously the direct testimony of this witness was only part of the truth, and complainant was prevented from getting the whole truth by the incompetent way in which this testimony was given. "The books are the best evidence" this witness says, and accordingly his incompetent and biased statements as to their contents and inscriptions should be disregarded. The same considerations apply to all of this class of testimony.

The only competent evidence of any competitive use of the name Webster consists of the twenty-five (25) dictionary exhibits which have been offered in evidence. Presumably

there are no others to be found, or they would have been produced.

Upon examination this list of twenty-five alleged competitive Webster's dictionaries, mainly recent books, dwindles considerably.

Webster's Library Dictionary, published by Donohue & Co.

Webster's Business & College Dictionary, published by W. B. Conkey Co.

Webster's Modern Dictionary, published by L. W. Walter Co.

Webster's American Standard Dictionary, published by Commonwealth Pub. Co.

These four exhibit books are the same identical dictionary printed from the same or a duplicate set of plates. These dictionaries were published by Donohue & Co. as late as the year 1905 under the title of "Donohue's Standard New Century Dictionary", in connection with which the name Webster does not appear. Doubtless all four books are printed by one concern and distributed with the other names in the imprint for trade reasons in accordance with familiar custom. They are mere fraud books. *Rec. vol. I*, pp. 664, 665; See also *Exhibit Books*.

Webster's Universal Self-Pronouncing Dictionary, published by John C. Winston Co.

The above title as given by defendant is *not the title* of, and does not appear upon the book itself which is entitled, "Universal Self-Pronouncing Dictionary". The name Webster does not appear in the title upon either the title page or cover of this book which merely purports to be "based upon the solid foundation laid by Noah Webster and other lexicographers". This book is substantially the same book as the book of the two defendants involved in this case. It is a substantial reprint of the "Crown" dictionary. *Rec. vol. I*, p. 665; See also *Exhibit Books*.

Webster's School & Office Dictionary, published by Thompson & Thomas.

This book is apparently printed from the same or a duplicate set of plates as a book originally published under the title of "The Complete Compendium" by William Rawlston Balch, in connection with which the name Webster nowhere appears. It was a plain fraud to change its title to "Webster's School & Office Dictionary", and there is no evidence as to when this was done. *Rec. vol. I*, p. 666; see also *Exhibit Books*.

Hurst's Webster's Dictionary, published by Hurst & Co.

This is the same book which has already been discussed. The above title is a mere cover title and the title given upon the title page is substantially different. This book was originally published under the following titles, which do not include the name Webster, viz: "The American Diamond Pronouncing Dictionary"; "Hansell's Practical Illustrated Pronouncing Pocket Dictionary"; "The American Popular Dictionary"; "The Handy Reliable Dictionary". The name Webster was certainly not added to it until after 1891. How long after does not definitely appear. *Rec. vol. I*, pp. 666-7. See also *Exhibit Books*.

Webster's Pronouncing Dictionary, published by F. Tennyson Neely.

This is the same identical dictionary apparently printed from the same or duplicate plates as a book previously published under three different names, none of which include the name Webster, to wit: "Craig's Dictionary", dated 1882; "The Excelsior Dictionary", dated 1883; "The Popular American Dictionary", dated 1886. It was a mere fraud to adopt the name Webster for such a book. *Rec. vol. I*, pp. 667-8; see also *Exhibit Books*.

Laird & Lee's Webster's New Standard Dictionary, Library Edition.

Laird & Lee's Webster's New Standard Dictionary, Common School Edition.

Laird & Lee's Webster's New Standard Dictionary, Elementary School Edition.

Laird & Lee's Webster's Modern Dictionary.

Laird & Lee's Webster's New Standard American Dictionary, Encyclopedic Edition.

Suit was promptly brought against Laird & Lee for using the name Webster upon these books, and that suit is now pending in the Federal Court at Chicago before a Master. The two books designated "Library Edition", and "Common School Edition" are printed from the same plates and are identically the same book with possibly very minor changes. See *Exhibit Books*.

Webster's Inter-Collegiate Dictionary; Webster's Adequate Dictionary; Webster's Sterling Dictionary; Webster's Reliable Dictionary, published by Ogilvie and Saalfeld.

These are the dictionaries recently enjoined in the Sixth Circuit. The "Adequate", "Sterling" and "Reliable" dictionaries are identical with each other, and are the same book under different names. They are also identical with the "Inter-Collegiate", having been made from the latter by simply lifting out the type for the concluding portion of the definitions. All these books were printed from one setting of type appears from the fact that their lines exactly register. Moreover these books are copied *verbatim et literatim* from the British "Chambers' Twentieth Century Dictionary", with which they are more than 98% identical, as will appear from inspection, and that fact has been found and adjudged by the court.

The group of five small vest pocket dictionaries are mere word lists of no literary importance. One of them is on its face a mere advertisement intended to be given away.

There was no attempt to show that any of these books have acquired any reputation, authority or good will of their own. Their character may be judged from their history and their frequent change of name. The Court is asked to presume from their mere existence in the market, for that is all that is shown, that they have destroyed the secondary meaning, good will and reputation of the genuine established Webster Dictionaries, developed as one series under one responsible supervision for almost a century.

By means of incompetent testimony, already referred to, and by duplicating the same publication under different names and titles, defendant claims a long list of competitive publishers of Webster Dictionaries since 1889. It is shown by the testimony of defendant's witnesses that the plates and contents of these books have been shifted among various publishers, and their titles have been changed from time to time, and that all sorts of names have been placed in the imprints (*Rec. vol II*, pp. 1393; 1010; 1014; 1015; 1016; 1819). It is fair to presume that the various books referred to and not produced are the same books as those that were produced and offered in evidence. The infringement upon complainant's trade rights has been quite extensive, but not nearly so great as defendant strives to make it appear. Thus in the list of alleged competitive publishers defendant names the American Book Co., Ivison, Blakeman, Taylor & Co., and Reilly & Britton Co. All of these are shown to have been mere licensees of complainant selling complainant's books (*Rec. vol. I*, pp. 132, 133, 165, 221, 222, 635, 591, 592). The Miles Vest Pocket Dictionary, referred to but not produced, is the same as the Wehman Vest Pocket Webster, which was produced and which bears the Miles copyright. The Vest Pocket Webster Dictionaries referred to as having been published by M. A. Donohue & Co., The Saalfeld Publishing Co., Thompson & Thomas, I. & M. Ottenheimer, George W. Ogilvie & Co., David McKay, none of which were produced, are the same identical book as the Hill's Vest Pocket Webster, which was

produced. The five dictionaries alleged to have been published by Ogilvie are the same as the similar dictionaries published by Saalfield as Ogilvie's successor. The Success Publishing Co. simply used one of the Ogilvie-Saalfield books as a premium (*Rec. vol. I*, pp. 107-108; 181-184). The Monarch Book Co. was a mere name in the imprint of the Saalfield dictionary (*Rec. vol. III*, fol. 7258). The Hampden Publishing Co. was stopped by injunction from using the name Webster, the decree being entered *pro confesso* (*Rec. vol. III*, fol. 7281). The Webster's Standard American Dictionary claimed to have been published by John Hovenden is apparently the book of the same name issued with the imprint of the Commonwealth Publishing Co., and which is identical with several others. The Riverside Publishing Co. merely sells one of the Saalfield large dictionaries (*Rec. vol. III*, fols. 7295-7299).

Complainant's answer to the existence of these infringing publications is that they have not yet destroyed the secondary meaning and trade significance of the name Webster; that the use of the name Webster thereon is still deceptive, and that piracy by one person does not authorize or justify piracy by another.

With substantially all these competitive or infringing books before him, and referred to by him in his opinion, Judge Colt in 1904, notwithstanding their existence, found that the name Webster's Dictionary still retained its secondary meaning, which it had acquired at and prior to 1889, and indicated the books published by the complainant. This finding was affirmed on appeal. No other result was possible.

II.

EVIDENCE SHOWING TRADE SIGNIFICANCE AND SECONDARY MEANING OF NAME "WEBSTER'S DICTIONARY", AND DECEPTION OF PURCHASERS BY DEFENDANT.

A. PURCHASERS ACTUALLY DECEIVED.

F. W. Seybel is a merchant and importer, and president of the F. W. Seybel Company. He purchased a copy of defendant's book from the *New York American*. He con-

sidered "Webster's Dictionary" as "the leading dictionary" (*Rec. vol. I, fol. 996*) and knew that the Merriams were the publishers of it (*Rec. vol. I, fol. 997*). He believed he was getting a genuine "Webster's Dictionary" which had a favorable reputation with him. He testified in part as follows:

"I did not know what this was, nor did I have the time or opportunity to examine it very critically. I would not have been interested had I not believed that I was purchasing the genuine dictionary, Webster's dictionary" (*Rec. vol. I, fol. 1002*).

He said he meant by a "genuine Webster's Dictionary" "a dictionary published by the Merriam Company known as Webster's Dictionary" (*Rec. vol. I, fol. 1003*). "I believed that there was only one Webster's Dictionary,—published by the Merriam Company; I mean by one that there were probably a number of editions; I believed that I was getting an abridged copy; I did not expect to get for such a small sum the Webster's unabridged . . . I presumed that I was purchasing an abridged copy of a genuine Webster's Dictionary, . . . of a current edition" (*Rec. vol. I, fols. 1003-1004*).

On cross-examination Mr. Seybel testified as follows:

"x-Q. 44. Are you more interested in buying a dictionary, or more particularly, in buying an edition of a Webster's dictionary, in the publisher or in the editor? A. I am interested in buying a dictionary more according to its reputation.

"x-Q. 45. Do you mean its reputation for the correctness of its contents or for the accuracy of its type and the elaborateness of its binding? A. For the correctness of its contents.

"x-Q. 47. What is there about the name 'Webster's Dictionary' that attracts you? A. Its name and reputation.

"x-Q. 48. Its reputation for what? A. Its reputation for being probably the best English dictionary extant.

"x-Q. 49. Why do you consider it so? A. For the reason that it is to be found in the best places of learning in English speaking countries.

"x-Q. 50. And when we have been using the term 'Webster's Dictionary' what edition of it have you meant? A. All editions in their time" (*Rec. vol. I, 1003-1023*).

Laura Dunbar Hagarty, a teacher of English in the Teachers' Training School at Buffalo, bought a copy of defendant's dictionary from the *Buffalo Evening News*. She testified:

"How did you come to make that purchase?

A. I read the advertisement in the *Buffalo Evening News* of a dictionary, Webster's Dictionary, for sale. I went to the *News* office and bought a dictionary that I thought I was going to pay \$4.98 for, but when I received the change, it was a 98-cent dictionary I bought. I thought I was buying the five-dollar edition of the G. & C. Merriam dictionary . . . I am not jumping at G. & C. Merriam, I have known of the publishing house for a great many years . . . Last spring my brother-in-law came from Winnipeg with a five-dollar copy of the G. & C. Merriam Webster's Dictionary. It was just the size that I wanted, in every way the dictionary that I wanted; and when I carelessly read the *News* advertisement, I thought that was the dictionary I was getting. That is why I jumped at that dictionary" (*Rec. vol. I*, fols. 1764-1767).

"Q. What effect did the name 'Webster' in the advertisement of this book have in inducing you to make this purchase? A. It had the entire effect. There was absolutely no other consideration.

"Q. Did you examine or test the book at or before the time you bought it? A. No.

"Q. What did you rely upon to show that it was a book worth buying? A. The title of 'Webster' on the cover . . . I intended to buy the genuine Webster, the G. & C. Merriam Webster" (*Rec. vol. I*, fols. 1668-1669).

Miss Hagarty failed to notice the name "Syndicate Publishing Company" on the title page. She also testified that she did not expect to buy the "Crown Dictionary" and did not know that she had in fact bought the book of that name" (*Rec. vol. I*, fols. 1770-1771).

Joseph C. Cooper, a bank clerk at Springfield, Mass., purchased defendant's dictionary from the *Springfield Union*, a newspaper of that city. He testified:

"I understood that it was the G. & C. Merriam's dictionary that they were offering, and I thought it

would be a good thing to have" (*Rec. Vol. I, fols. 448-450*). "I took it for granted that it was the Merriam's making this offer through the *Springfield Union*" (*Rec. vol. I, fol. 450*).

"Q. 24. Upon what did you rely, if anything, as an assurance that this book which you bought was an accurate, reliable dictionary worth buying? A. Upon the name 'Webster,' that first came in my head, probably from Webster's International Dictionary, and associating that with the Merriam's, I thought that if it was not the large dictionary it would be up to date to a certain extent, as far as they could make it so" (*Rec. vol. I, fols. 457-458*).

"I thought the *Union* had some deal on with the Merriam Company whereby they were getting along all right and the Company were too, and at the same time it was an advertisement for both" (*Rec. vol. I, fol. 455*).

Mr. Cooper had known of the Merriams as publishers of the Webster dictionaries as long as he could remember, and from the time he used it at school. He never knew that any concerns other than the Merriams published dictionaries under the name of "Webster's" (fols. 455-468). He did not examine the title page or note the name in the publisher's imprint (*Rec. vol. I, fol. 461*).

Irving S. Pulcifer, treasurer of the Springfield Safe Deposit Company, and a member of the Springfield School Board, bought a copy of defendant's dictionary without examination, relying upon the name "Webster" as an assurance of quality. That name conveyed that assurance "simply because I had known that the Webster's Dictionary was accepted as a standard authority" (*Rec. vol. I, 831-832*). He thought the book bought was "the only Webster I ever knew about; I assumed that it was a Merriam publication. . . . Because of the word 'Webster'" (*Rec. vol. I, fol. 830*). He testified that he had never heard of the Crown Dictionary; that he did not intend to buy it, and that if defendant's book had been published under its name of Crown Dictionary, he would not have bought it. He stated his reason: "Merely because I desired a dictionary that I could consult as authority and

not knowing anything about the standing of the so-called Crown Dictionary I certainly never would have purchased it" (*Rec. vol. 1, fol. 834-835*).

Charles Rogers, bought defendant's book without examination upon the reputation of Merriam's dictionary as a standard work and relying upon the title "Webster's Dictionary" as an assurance of quality (*Rec. vol. 1, fol. 798-799*).

"I believed I was buying a book which was issued by the Merriam folks. No doubt of it crossed my mind" (*Rec. vol. 1, fol. 783*).

Clinton W. Couder, the local representative in Springfield for the National Surety Company and for the Connecticut General Life Insurance Company, purchased defendant's book "under the supposition that it was a book published by G. & C. Merriam of Springfield, Mass." (*Rec. vol. 1, fol. 407*). He did not examine the book before buying it, "just took it" . . . "in the assumption that it was a bona fide Webster's Dictionary" (*Rec. vol. 1, fol. 408*). "The word Webster being connected with the title led me to suppose it was the real thing" (*Rec. vol. 1, fol. 408*). He relied on the name "Webster" as showing that the book was a good and reliable dictionary (*Rec. vol. 1, fol. 408*). "I bought it sight unseen" (*Rec. vol. 1, fol. 409*). He found the book unsatisfactory in one, because of the omission of words naturally to be expected to be contained therein (*Rec. vol. 1, fol. 409-410*). He had heard of the Crown Dictionary, but did not intend to buy a copy of it (*Rec. vol. 1, fol. 413-414*).

Edward Kennell, knew that G. & C. Merriam Company published the Webster's Dictionary and supposed they were the only publishers of it (*Rec. vol. 1, fol. 841*). He bought defendant's book through the *Springfield Union*.

"I intended to buy Webster's Dictionary; I thought that I got a Webster's . . . If I had been some other dictionary that they advertised I shouldn't have made the purchase" (*Rec. vol. 1, fol. 841-842*).

Some years before Mr. Kennell had purchased the Crown Dictionary from the *Christian Herald*, and had a

copy of it at home. He did not intend to buy another copy of it when he bought *Webster's Dictionary*. "I intended to buy a *Webster's Dictionary*" (See vol. 5, fol. 54v, 55r).

Charles F. Crossman, bought *Webster's* book. (See vol. 5, fol. 54v).

I merely noticed it was a *Webster's Dictionary*. . . . I presumed I was getting one of the common publications, *Webster's Dictionary*" (See vol. 5, fol. 54v).

"Q. 13. What connection did you think there was between the book which you bought from the *Springfield Store* and *Webster's International Dictionary*, previous to your obtaining it or at the time? A. I supposed they were published by the same party."

"Q. 14. What made you think that A. Brown the name of *Webster* was associated with both?" (See vol. 5, fol. 54v, 55r).

He testified that if the book had not been called "*Webster's Dictionary*" he would not have bought it, giving as his reason that he was acquainted with *Webster's Dictionary* and had no interest in any other (See vol. 5, fol. 54v).

George F. Clark, a book seller and clerk of the common council of Springfield, bought *Webster's Dictionary* without examination. "I laid it up from the word '*Webster*'" (See vol. 5, fol. 753). "I thought I was getting S. & C. Merriam's *Webster's Dictionary*" (See vol. 5, fol. 754). "That is what made me buy it" (See vol. 5, fol. 754-755). He had never heard of the *Cross Dictionary*, and did not expect to get it when he bought *Webster's Dictionary* (See vol. 5, fol. 754-755). He did not intend to buy another dictionary offered for sale, but expected to purchase the *Merriam Dictionary* which he believed was being disposed of through the newspapers at a cheap price to make way for a new edition (See vol. 5, fol. 755).

Henry E. Hays, a manufacturer, testified:

"I believed that I was buying a genuine *Webster's Dictionary*" (See vol. 5, fol. 755). "I supposed it was identical in a new form" with the *Webster's Dictionary* previously known to me (See vol. 5, fol. 755). He believed the book was no longer

ment of the original Webster's Dictionaries brought up to date by the authorized successors of Noah Webster's estate (*Rec. vol. I, fols. 1287-1289*).

"I was wholly influenced by the name 'Webster' . . . Webster meaning to me a dictionary of the highest standard" (*Rec. vol. I, fol. 1311*). He did not think about the publisher. "The name 'Webster' was all that interested me. . . . It meant to me the highest authority in a dictionary" (*Rec. vol. I, fol. 1294*).

He made no examination before buying, but relied on the name "Webster's" as "a guarantee that I was getting the best dictionary as far as I knew" (*Rec. vol. I, fol. 1291*).

"I did not give spelling a thought, taking it for granted that I was purchasing a genuine Webster's Dictionary in which the spelling was bound to be correct and never having heard of a Webster Dictionary that was not genuine" (*Rec. vol. I, fol. 1301*).

Mr. Hughes had never heard of the Crown Dictionary and did not intend to buy it when he bought the defendant's dictionary. The fact that defendant's dictionary was a reprint of the Crown Dictionary would have prevented his purchase if he had known of it (*Rec. vol. I, fols. 1303-1304*). When he learned the facts he felt that he had been imposed upon (*Rec. vol. I, fol. 1305*).

Arthur Lutz, a clerk, became acquainted with Webster's dictionaries at school where he used complainant's "Webster's High School Dictionary." He bought defendant's dictionary from the *Brooklyn Times*. He testified:

"I thought I was buying a copy of the Webster dictionary. . . . I believed the book which I was about to purchase was published by the same company as that which published the one I used at school" (*Rec. vol. I, fols. 1185-1189*). "I believed it was a book which was published by the company which I assumed published all Webster's dictionaries" (*Rec. vol. I, fol. 1192*).

"I believed that in purchasing a Webster's Dictionary I was getting the best book and the best value for the money I paid out" (*Rec. vol. I, fols. 1190-1191*).

"My impression had always been that the Webster Dictionary was the best authority and in

fact I have seldom had occasion to refer to any other, and for this reason I relied upon the name 'Webster' as it appeared on the cover of the book as something which indicated that I was to get the best book obtainable for the price" (*Rec. vol. I, fol. 1197*).

Edith Fisher, a teacher in the public schools at Buffalo, was deceived into purchasing defendant's book from the *Buffalo News*. She intended to buy "the regular Webster's Dictionary" (*Rec. vol. I, fol. 1737*). She bought defendant's book "because it was advertised as the 'Webster'" (*Rec. vol. I, fol. 1739*).

"I supposed it was by the same author as the one we had used in the schools" (*Rec. vol. I, fol. 1740*).

She thought it was one of the books that are standard in the Buffalo schools (*Rec. vol. I, fol. 1741*). She would not have bought it had it been called "Crown Dictionary."

"I would not have bought it if it was not called Webster's. . . . I wanted a Webster. . . .

How could it be a Webster if it was a Crown?

. . . . If I thought it was ever called the Crown, I don't suppose I would ever have bought it—if it had ever been called anything but a 'Webster.'

. . . . I wanted something that was a real Webster, not anything based on it. Any book might be based on anything else, and still be entirely different.

. . . . Q. What do you mean by 'a real Webster'?

A. One that has been called nothing but a 'Webster'; always been a Webster; from the original Webster. . . . I don't see why they would

ever call it anything but a Webster; I don't see what reason they would have to change the name of it. . . . I think if I started out to buy a 'Web-

ster' I would not want one that had been called something else some other time. . . . In a

sense it would have to be based upon it," (*i. e.*, the original dictionary written by Noah Webster) "of course; but I think it would have to be more than 'based' on it." Any story may be 'based'

on anything, just take a few facts but not the whole story. This dictionary may be 'based' on the original, but only a few words, giving the same meanings, and a lot of others changed, and still it can 'be based' on it, and would not be the real Webster.

That is the way I understand it. . . . As long as Webster's has always been regarded as the best dictionary, I don't see why they would change the name and call it 'The Crown'" (*Rec. vol. I, fols. 1743-1758*).

Ida Smack, intended to buy the "real Webster's" (*Rec. vol. I, fol. 1717*). "I thought it was one and the same thing," as the dictionary of established reputation (*Rec. vol. I, fol. 1418*). She relied on the name "Webster" as an assurance of quality. "I supposed the name was all that was necessary" (*Rec. vol. I, fol. 1419*). "I always felt that you could rely on Webster's Dictionary, but when I found I did not have the real book I lost all confidence in it" (*Rec. vol. I, fol. 1424*). In buying she expected to get a book "with a reputation" (*Rec. vol. I, fol. 1444*).

Richard W. Geldert, bought upon the good reputation of Webster's Dictionary. "I expected the unabridged edition of Webster's Dictionary" (*Rec. vol. I, fol. 1407*). "I expected an up-to-date one" (*Rec. vol. I, fols. 1410-1411*). "I thought it was one and the same thing" as the Webster's Dictionary of which he had previously known (*Rec. vol. I, fol. 1405*). He had never heard of the Crown Dictionary

Charles J. Timms, bought defendant's book without examination, relying on the reputation of Webster's Dictionary. "I only knew of one dictionary as Webster's" (*Rec. vol. I, fols. 1368-1369, 1875*). "I thought there was only one publisher" (*Rec. vol. I, fol. 1375*). He was attracted to buy by "the name Webster" (*Rec. vol. I, fol. 1365*), and because: "I considered the name 'Webster' as being the best book published in the way of a dictionary" (*Rec. vol. I, fol. 1365*). "I thought it was the real Webster Dictionary brought right up to date" (*Rec. vol. 1367*).

E. Louise Burlingham testified:

"I expected to get the Webster's Dictionary, published by the original publishers of Webster's Dictionary. . . . Because I considered that dictionary the best dictionary published" (*Rec. vol. I, fol. 1263*).

She bought without examination believing the book reliable because of the name and reputation (*Rec. vol. I, fols. 1249, 1251, 1257*).

"I thought it was the famous Webster's Dictionary" (*Rec. vol. I, fol. 1252*). She believed the book was the original Webster's Dictionary revised and brought up to date by the same publishers who had continuously revised the book and who were the successors of Noah Webster's estate (*Rec. vol. I, fols. 1272-1277*). She had never heard of the Crown Dictionary and did not intend to buy it" (*Rec. vol. I, fol. 1255*).

Thomas F. Foley testified that he

"intended to buy a Webster's Dictionary . . . I was under the impression that all Webster's dictionaries were the same. . . . I did not examine it before purchasing, taking it for granted that it was a Webster's Dictionary. . . . Because of its name. . . . I was under the impression that any book bearing the name of 'Webster' was worth ninety-eight cents" (*Rec. vol. I, fols. 1115-1121*).

The book Mr. Foley purchased contained the explanatory statement required by the preliminary injunction, but it was not noticed by him, and did not prevent deception (*Rec. vol. I, fols. 1147-1148, 1227*).

Edward J. McMahon testified that he bought defendant's book "on the reputation of the Webster's Dictionary" (*Rec. vol. I, fols. 1218, 1209-1212*). "It had the effect of making up my mind that I would buy one" (*Rec. vol. I, fol. 1213*). "I thought I was buying a Webster's Dictionary" (*Rec. vol. I, fol. 1220*). "I merely went by the reputation of Webster's Dictionary; it had a high reputation and I didn't know there was more than one firm publishing it" (*Rec. vol. I, fol. 1223*). "I thought there was only one publisher of 'Webster's dictionaries' (*Rec. vol. I, fol. 1226*). "If I knew there had been any question of its being a Webster's Dictionary at the time, I would not have purchased the book at all" (*Rec. vol. I, fol. 1230*). He believed defendant's book was abridged from the current unabridged dictionaries (*Rec. vol. I, fols. 1237-1238*).

William W. Newberry, a banker of St. Louis, bought defendant's book from the *St. Louis Post Dispatch*, believing it to be the standard Webster's Dictionary of good reputation. He bought it because it was advertised as a Webster's

Dictionary (*Rec. vol. I, fol. 1610*). "Had it been any other dictionary I probably would have paid no attention to it at all" (*Rec. vol. I, fol. 1611*). The name "Webster" meant to him "a reliable and accurate dictionary" and "one of authority" (*Rec. vol. I, fol. 1613*). "It is connected in my mind with the original Webster, and the one that we learned to respect in school" (*Rec. vol. I, fol. 1616*). "I expected to get a dictionary that was either edited, revised or published by the same interests that put out the dictionary of thirty years ago" (*Rec. vol. I, fol. 1620*). He said he would not have the same confidence in a new abridgement of the old dictionary made by new interests (*Rec. vol. I, fols. 1620-1625*).

Charles D. Bond, who was in the general subscription business testified that he canvassed for the "Success Magazine" offering a copy of Webster's Inter-Collegiate Dictionary as a bonus with subscriptions; that he thought the book was one of the Merriam Company's dictionaries, and that he took a subscription and sold a copy of the book with that understanding on his part, and with the same understanding on the part of the purchaser. He testified:

"Q. 10. Who did you think was the publisher of the Webster's Inter-Collegiate Dictionary thus offered as a premium? A. G. & C. Merriam Company.

"Q. 11. What made you believe that? A. I had not known of any other dictionary publisher of that name, that is, any other publisher publishing a dictionary by that title.

"Q. 12. By what name? A. Webster's Inter-Collegiate Dictionary.

"Q. 13. What part of the title made you think the Merriams were the publishers of that book? A. 'Webster's'". *Rec. vol. I, fol. 408*.

He sold the book to Dr. Boynton, who was also called as a witness.

Walter J. Boynton, a doctor of dental surgery testified (*Rec. vol. I, fols. 719-747*), that he had owned a copy of Webster's Dictionary since 1888; that he remembered using

Webster's Dictionary when a boy at school and that for the last sixteen years he had known G. & C. Merriam Company as the publishers of Webster dictionaries. He subscribed for the *Success Magazine* and obtained Webster's Inter-Collegiate Dictionary as a bonus. He asked Mr. Bond at the time: "Is it published by the G. & C. Merriam Company? He says, it must be; it is a Webster's Dictionary" (fol. 727). . . . "Q. What particular part of the title of that dictionary brought the Merriam Company to your mind? A. The term 'Webster'" (fol. 731).

The Webster's Inter-Collegiate Dictionary here referred to is one of the books enjoined in the Saalfeld suit.

Edward Gash, a traveling salesman, bought one of defendant's dictionaries from the *New York American* (Rec. vol. I, fols. 1079-1108). He had known of Webster's dictionaries since the time he was at school. He regarded Webster's Dictionary as a standard dictionary: He testified:

"Q. 11. Please state the circumstances under which you bought this book, including what you intended to buy and what you thought you did buy and the consideration which induced you to make the purchase. A. I bought it on the strength of the word 'Webster' and thought it was a very cheap book at the price.

"Q. 12. What relation did you think this book had to the Webster's dictionary of which you had previously known? A. I thought it was the same book, as far as my knowledge of the dictionary goes.

"Q. 13. Did you know the specific name of the concern which published the Webster's Dictionary which you had known since you were at school and which you say you have regarded as a Standard Dictionary? A. I did not.

"Q. 14. Just what do you mean when you say you bought this book on the strength of the word 'Webster'? A. Of the reputation of the name 'Webster.'

"Q. 15. Then if I understand you correctly you thought this book which you bought from the *New York American* was the book which had the reputa-

tion which is attached to the Webster's dictionaries which you have known as standard authority. A. That is correct " (*Rec. vol. 1, fols. 1083-1085*).

He further testified :

" I wanted a genuine Webster's Dictionary, and I thought that is what I was buying.

" x-Q. 23. Well, what do mean by a genuine Webster's Dictionary? A. A dictionary known as a Webster's Dictionary when I was a boy " (*fols. 1091-1092*).

" x-Q. 21. As a matter of fact do you care who the publisher is? A. Well, not as long as it is a dictionary, but the word ' Webster ' would carry it a great way in my belief " (*fol. 1094*).

" x-Q. 28. You have spoken several times about having been attracted to the book by the reputation of the name ' Webster ' ; you meant by this I suppose the reputation of the editor Noah Webster who originally compiled the great unabridged dictionary? A. I was attracted by the name of ' Webster, ' ' Webster's Dictionary. '

" x-Q. 29. What made the name ' Webster ' attractive to you? A. Because I used it as a boy and I know that Webster's was the standard dictionary as far as my belief.

" x-Q. 30. What made you think that the dictionary you used in school was the standard dictionary? A. I have no belief that it was the standard dictionary, only that it was used in school and was the ' Webster's Dictionary ' (*fols. 1098-1099*).

Re-d. Q. 35. You stated that you bought the book without examining what was in it. What was there about it that convinced you that you wanted it? A. Why the word ' Webster ' " (*fol. 1101*).

John Paul Catherine, a clerk, purchased a copy of defendant's dictionary from the *New York American*. He testified in part :

" Q. 9. What was there about the advertisements that attracted you to make this purchase? A. I saw an opportunity of procuring an up-to-date Webster's Dictionary at a cheap price.

"Q. 10. Did you examine the dictionary at or before the time you bought it? A. No, sir.

"Q. 11. Upon what did you rely as an assurance that it was a good and accurate book worth buying? A. I relied on the name of 'Webster's' Dictionary.

"Q. 12. Did you know at that time the name of the publisher of the Webster's Dictionary of which you had previously known and which you say you regarded as a standard authority? A. No, sir.

"Q. 13. Did you know at that time whether there was more than one concern issuing dictionaries under the name of 'Webster's' dictionaries? A. No, sir.

"Q. 14. At that time had you ever heard of a dictionary entitled the 'Crown' Dictionary? A. No, sir" (*Rec. vol. I, fols. 1389-1390*).

" . . . Q. 20. Did you find the book completely satisfactory in use? A. I was somewhat disappointed in the book, as I found many words that I was anxious to learn the definitions of were not there; for example, on the first page they print that it is based upon the unabridged dictionary, and upon looking for the definition of the word 'unabridged' I fail to find it in this book. Another very common word I fail to find there is 'inopportune'; there were many others that I don't recall. . . .

"Q. 22. Did the fact that it was offered by a newspaper in connection with a coupon scheme have any effect upon your mind? A. Yes, it did. I thought that the *New York American* with their opportunities were giving us a bargain" (*Rec. vol. I, fols. 1393-1395*).

H. M. Condit, Secretary of The Stationers Board of Trade of New York City, testified, that seeing an advertisement of Webster's Imperial Dictionary, which is the book published by the Saelfield Publishing Company, he wrote direct to the Merriam Company for a quotation of the price of this dictionary, thinking they were the publishers of the book. He "thought it best to go direct to headquarters, viz., to the Merriams, with a view of getting the best and lowest price possible quoted" (*fol. 1554*).

B. PUBLISHERS, BOOKSELLERS AND LITERARY MEN.

Isaac K. Funk, president of Funk & Wagnalls Company, the publishers of the well known "Standard Dictionary", testified on behalf of complainant (*Rec. vol. I*, fols. 1448-1468). He testified in substance that in the year 1890 his Company took steps to issue a revised edition of Webster's Dictionary of 1847, upon which the copyright had expired, under the title, "Revised Webster's Dictionary", and that they abandoned their intention of using that name because: "Shortly after beginning we abandoned it because we determined to make a new dictionary bringing it fully down to date; and it seemed to us that it was not wholly fair to use the name of another dictionary, which had a market value for our own production" (fol. 1452). Dr. Funk testified to the very great reputation of the Webster dictionaries of G. & C. Merriam Company, whom he said he had known as publishers of Webster dictionaries for fully a third of a century up to that time (fol. 1455). He further testified:

"Q. 16. Has your experience in the dictionary business been such that you are able to say whose book is meant by the term 'Webster's Dictionary' as used by the general public to-day? A. I think that ninety-nine out of a hundred persons would think that it is meant the work that is published by G. & C. Merriam.

"Q. 17. Are you aware that in recent years there have been quite a number of dictionaries issued in this country using the name 'Webster' in their title which have not been published by G. & C. Merriam Company? A. Yes, I am.

"Q. 18. In view of that fact, do you still think that Webster's Dictionary means the Merriam Company's dictionaries in the public mind? A. In the mind of the general public, yes.

"Q. 19. Have any of these so-called Webster dictionaries issued by publishers other than the Merriams acquired or do they now possess the reputation and authority which you have said Webster's Dictionary possesses? A. No" (fols. 1456-1458).

"x-Q. 24. It is alleged in the complaint and an admitted fact in this case that Noah Webster, the compiler of the 1828 Webster Dictionary which you have referred to as the original Webster, died in 1843, and that the 1847 edition was not completely prepared by him. Do you think that the 1847 edition was properly called 'Webster's dictionary'?"
A. I do.

"x-Q. 25. Do you think that a dictionary based on the 1847 edition of Webster's dictionary is properly called a 'Webster's' dictionary? A. I think not to day, in view of the many additions that have been made to the Webster dictionary from that time to the present and the impression that the word 'Webster' makes on the public mind.

"x-Q. 26. Do you think that the name 'Webster' is associated in the public mind with the author of the dictionary or the publisher? A. I think *it is associated with the work*, that is, the dictionary of to-day, which is recognized by the name 'Webster'" (fol. 1463-1464).

"x-Q. 29. I suppose you think a book which is largely new and different although based on the 1847 Webster, could not properly be called a 'Webster's' dictionary? A. I think not; if it does not come down in the regular line" (fol. 1466).

Irving Putnam, of the firm of G. P. Putnam's Son of this City a publisher and bookseller of long standing, testified for complainant (*Rec. vol. I, fols. 1558-1604*). He testified that Webster's Dictionary as a work of reference had the highest standing of any in this country (fol. 1560); that the Merriams were the publishers of the book he referred to, and that no dictionary published under the name of Webster by any one else had such standing and reputation (fol. 1561); that an order for Webster's Dictionary given by an ordinary purchaser means a Webster's Dictionary of the Merriam series, (fol. 1563); that purchasers always expected the latest edition of the particular series (fol. 1566); that the average purchaser regards a small Webster's Dictionary as an abridgment of the large Webster's Dictionary and that all small Webster diction-

aries are based absolutely upon the larger book (fols. 1567, 1569). Mr. Putnam also testified (*Rec. vol. I*, p. 394):—

“ Q. 21. What effect upon the probable sales of a new dictionary would the use of the name ‘Webster’ as a whole, or a part of the title, have? A. It would give it a distinct advantage before the public.

“ Q. 22. In what way? A. The name ‘Webster’ being in the minds of the general public in this country connected with the series of books that has been to them for three generations the standard authority in all matters pertaining to the English language, a dictionary offered to the average person with the name Webster on, would mean that the book was connected with this great authority for which they had always had respect, and on that account, of course, the average intended purchaser would be much more apt to buy a book with the name of ‘Webster’ on it, than with a name that meant nothing to them. For instance, today the name ‘Worcester’ on a dictionary would be of comparatively little value commercially, for general sale, although fifty years ago Worcester’s dictionary and the name ‘Worcester’ as connected with dictionary material stood far higher before scholars and the general public than did Webster. Worcester’s dictionaries, however, have not been revised and developed during the last thirty years, and the consequence is that the word ‘Worcester’ does not now carry with it any respect or prestige; ‘Webster’ on the contrary, having been connected with a series of books not only kept before the public for the last half century, but, constantly developed, enlarged and revised and brought up-to-date by an enormous expenditure of time and scholarship, stand before the public in such a light that they have increased confidence and respect for the series, and naturally assume that anything in the nature of a dictionary having the magical word ‘Webster’ on it, is entitled to their confidence ” (fols. 1573–1578).

“ The value of Webster today is something quite apart from the value of Webster as connected with the various editions of Webster’s dictionaries long out of copyright. The name ‘Webster’ today in my opinion, stands for a series of reference books

that have been built up from what was merely a germ in the form of the original 'Websters' dictionary. These books have intended to keep pace with the rapid development of the English language and their value as authorities depends upon the accuracy and scholarship with which they have kept this pace" (fols. 1581-1582).

Mr. Putnam also explained the difference between reprints of ordinary literary works upon which copyright had expired and reprints of dictionaries and other reference works as follows (p. 397):

"It seems to me that is a very decided difference. The copyright having expired, there is no injury to reputation or prestige in reprinting a volume of Longfellow's Poems, or a story of Edgar Poe, or a volume of essays by Irving. If the material is reprinted correctly and without garbling it, there can be no harm, except the commercial competition of the sale of such reprints with the former copyrighted editions. It is quite a different matter when a reprint is made of an early edition of a book of reference. Such reprint issued with a current date, unless it is emphasized in the clearest way that the book is but a reprint of an edition half a century out of date, cannot but do injury to the sale of the legitimate revised editions and is, as a matter of course, a gross deception of the public that buy it. It is quite evident that the use of the word 'Webster' is to take an unfair advantage and to use unfair competition with the publishers of the modern work; otherwise, some other name would be used. If it was meant merely to make such use as under the law was permissible, that is, to make use of material of which the copyright has expired, it would have been easy to indicate that. But, this of course, would have rendered the book so issued of no commercial value; the only commercial value that attaches to it, is from the connection in the mind of the public of the word 'Webster' with the modern series of Webster's dictionaries" (fols. 1586-1589, see also *Mead*, fols. 1901-1906; 1919).

Mr. Putnam also said that most of the plain people have been to school and used Webster dictionaries in the various

grades, and here they acquired knowledge of Webster's Dictionary as a series of books (ibid. 195f).

William E. Clarke, a bookseller in Boston, who had been selling dictionaries for over forty-five years, testified, that the name "Webster's Dictionary" means to the average customer the latest edition published by G. & C. Merriam Company. "I don't remember any time when it was not true since I have been in the business". He had always filled orders for Webster dictionaries with Merriam books. He testified that an order for Webster's Dictionary today would not be properly filled by a copy of the 1827 edition; that the reputation of Webster dictionaries has a decided effect upon their sales and that no books could now be sold in the market as a Webster's Dictionary which would not get the benefit of the reputation of the Merriam Company's copyrighted editions of Webster's Dictionary. (See. vol. I, file. 1957-1958.)

John Quincy Adams, a publisher located in Boston, whose concern is the New England sales office for Complin's dictionaries, testified as to the great reputation of Complin's Webster dictionaries; that no order given today for a Webster's Dictionary would not mean a copy of the edition of 1827, which "would in ninety-nine cases out of a hundred disappoint the customer"; that the Complin's Webster dictionaries have a very large use in the school systems of America, and that his own office supplies many of the large school systems in New England with the Merriam Webster; that the current editions of Complin's books are the books with the high reputation, and that in his judgment the present-day reputation of Webster dictionaries "comes largely on editions published since 1827." (ibid. 1957-1958.)

Mr. Adams also said (See. vol. I, p. 224):

"From my knowledge of the Dictionary business during ten years, I should say that any book published by others than the Springfield Merriam would profit tremendously by the use of the Webster name and reputation.

"The name Webster, through the efforts of the G. & C. Merriam Company, has more than held its own, has become synonymous with the highest possible scholarship and the best in every quality. This reputation which the name has inspired has caused with confidence, which is a new step up to the sale of Webster's Dictionary, through the sale of G. & C. Merriam Co. It was easily secured and securely secured." (1891-1892-1893).

"The name Webster is more and more that we have observed as to the competition and to the fact is that it has been carried out. The company has the effect of the results of our attention to other and parts of the English language of the fact that people reading Webster's have purchased books published by others than the Merriam Company and have noted to our attention that they bought those books comparing them with the English Dictionary which others have for to show that they found no Webster's Dictionary. We have to the competition mostly in certain centers where those other books have been advertised, and customers spring and all advertisements have been to some extent more carefully selected, and a large number of people have told our attention that they in general dissatisfaction is their community with the quality of Webster's Dictionary and in regard to other men have found that the books purchased them as carefully long than found by some persons other than G. & C. Merriam, the general reputation has affected the whole Dictionary market." (1891-1892-1893).

Other Merriam will agents covering widely separate territories in the United States have written acknowledgments to the same effect as Mr. Wilson. See for instance, *St. Paul, Minn.*, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Numerous prominent scholars, educators and literary men testified to the fact that the great reputation of Webster's Dictionary today has been acquired by and is due to the current Webster Dictionary of competitors.

that the name Webster's Dictionary today means only the dictionaries of complainant, and that even a historically genuine copy of an obsolete edition upon which the copyright has expired is not today the book intended when the name Webster's Dictionary is used. Such testimony was given by *Andrew S. Draper*, Commissioner of Education of the State of New York, who also states that the complainant's Webster dictionaries had been approved for school use in that State. (*Rec. vol. I*, pp. 500, 501); by *George H. Martin*, former Secretary of the Massachusetts State Board of Education (*Rec. vol. I*, pp. 457, 464); by *Edwin D. Meade*, Director of the World's Peace Foundation in Boston, and for twenty-five years Director of the Old South Historical Work (*Rec. vol. I*, pp. 472-484); by *Horace G. Wadlin*, Librarian of the Boston Public Library (*Rec. vol. I*, pp. 467-472); and *Henry H. Van Dyck*, formerly a proofreader and later a lawyer and editor. (*Rec. vol. I*, pp. 332-40).

The fact that citations in legal opinions relying upon "Webster's Dictionary" or merely "Webster," do refer to complainant's copyrighted books is shown, without contradiction, by the testimony of Henry Van Dyck, who was for many years an editor and proof-reader upon the American & English Encyclopedia of Law. It was his duty to verify all such citations and he therefore testified from first-hand knowledge that such judicial references to Webster's Dictionary invariably mean complainant's current Webster's Dictionary. (*Rec. vol. I*, fols. 1325-1346.)

Further on the subject of deception of purchasers, and secondary meaning of the name Webster, these witnesses testified:

"x-Q. In your opinion does the ordinary purchaser of a small abridged Webster's dictionary think about the publisher? A. He perhaps does not think who the publisher is, but he most certainly has in mind a 'Webster' dictionary belonging to the series of well known Webster's dictionaries, of which he has heard and read from childhood. . . . They know the Webster dictionaries from the unabridged of '64 to the present time, and know them

as authoritative." (*Haymaker, Rec. vol. I, fols. 1532, 1545.*)

"I don't think the average purchaser looks very carefully for the name of the publisher or the origin of the book they are buying; I think they assume that the Webster dictionary is one of the series of Webster books which they have grown up to consider as the great authority on spelling and definitions.

x-Q. 29. Do you think that the average purchaser of such a book considers at all the origin of the book or its publisher? A. Not very much; he considers the name of it much more than the publisher." (*Putnam, Rec. vol. I, fols. 1570, 1571, 1594.*)

"Only a portion of the customers remember the actual name of the publisher of the book. . . . The average purchaser does mean such edition or editions" (*i. e., those published by the Merriams*) (*Clarke, Rec. vol. I, fols. 1148, 1149.*)

"I doubt whether one such man in ten knows the publisher of the Standard Dictionary. Most people know that the Merriams have always been the publishers of the Webster dictionaries—most scholarly people, I mean. I doubt whether the man in the street remembers that the Webster's dictionaries are published by the Merriams. . . . I think the fact that Merriams' name was not on the imprint would not affect lots of people as thinking they were getting what we ordinarily speak of as Webster's dictionaries when we mean the Merriam editions" (*Mead, Rec. vol. I, fols. 1924, 1925, 1927.*)

"I think the public generally understand Webster's Dictionary to be the original Webster's Dictionary as revised and expanded under the publishers who have had control of that work through a long series of years" (*Wad. in, Rec. vol. I, fol. 1884.*)

x-Q. 27. Do you think the general public when purchasing a Webster's Dictionary think about the publisher at all? A. Sometimes yes, about the publisher; but I always think in accordance with an impression that has been made on their mind by iteration and reiteration of that name 'Webster' in connection with dictionaries. . . . I think that ninety-nine out of a hundred persons would think that it meant the work that is published by G. & C. Merriam" (*Funk, Rec. vol. I, fols. 1463, 1464, 1456.*)

Webster's Dictionary means "the genuine and original dictionary, such as has been used by the Public Schools and professional and literary people, whether they knew the publishers G. & C. Merriam Co. or not" (*Gifford*, fol. 959).

III.

EVIDENCE AS TO LITERARY ORIGIN OF DEFENDANT'S DICTIONARY.

The only evidence offered by defendant to support its defence that its "Crown" Dictionary was based upon Webster's Dictionary of 1847, was the expert opinion evidence of Professor Peck, which was wholly based upon his comparison and markings of the books in question.¹ It was shown upon his cross-examination that his markings were unfair and inaccurate and that he had habitually marked matter as having been copied or paraphrased which afforded not the slightest justification for the claim.² The very matter which Peck selected as showing that defendant's book was taken from Webster 1847,³ is conclusively shown to have been taken directly from the old British Empire Dictionary,⁴ and it was further shown that this same matter might equally well have been taken from various other standard English dictionaries and in fact, apparently was in part taken from such dictionaries rather than Webster.⁵ Professor Peck thereupon marked some two hundred pages of defendant's book, the markings purporting to show identities, practical identities and paraphrases with or from Webster's Dictionary of 1847.⁶ From these markings defendant calculated that about 67% of its book was taken directly from Webster's Dictionary. These markings are utterly incorrect, as an actual com-

Peck, Rec. vol. III, pp. 1534 et seq., 1914 et seq.

² *Peck, Rec. vol. III, fol. 6470-6636.*

³ See Defendant's Exhibit C.

⁴ See "Complainant's Red Letter Exhibit."

⁵ Complainant's Parallel Column Exhibit in Answer to Peck's Exhibit.

⁶ See Defendant's Marked Volume Exhibits.

parison of the matter marked by Professor Peck will immediately demonstrate. The following is a comparison of specimen definitions marked in blue by Professor Peck, and asserted by him to be practically identical with and to indicate copying from the 1847 Webster. The additional definition is taken from one of the books in evidence and shows how much greater the similarity is to other British dictionaries.

“ADIT.”

Defendant:—“An entrance to a mine more or less horizontal.”

Cassell:—“A more or less horizontal entrance to a mine.”

Webster:—A term in mining, used to denote the opening by which a mine is entered, or by which water and ores are carried away; called also the drift.”

There is almost no similarity even, much less any identity, between defendant's and Webster's definition. Defendant's definition *could not* have been copied from Webster because it contains a meaning or qualification not given by Webster, viz.:—“more or less horizontal.” But these identical words are found in Cassell's Dictionary. In spite of the indications that Webster was not used in this instance, Peck here counts five words toward his percentage of “identities.”

“BANNS.”

Defendant:—“The proclamation in church of an intended marriage.”

Cassell:—“Proclamation in church of an intended marriage.”

Webster:—“In the plural, the words *bans* denotes notice of a marriage proposed, or of a matrimonial contract, proclaimed in a church or other place prescribed by law.”

Note the absolute identity with Cassell, and the total difference from Webster, including the spelling. The three

unavoidable and non-significant words "marriage," "in," and "church" are the only "identities" (*sic!*), but Peck counts eight (8) towards his percentage.

"CALIPASH, and CALIPEE."

Defendant:—"CALIPASH, *n.* The part of a turtle belonging to the upper shell inclosing a dull greenish gelatinous substance."

"CALIPEE, *n.* The part of a turtle belonging to the lower shell, inclosing a light yellow gelatinous substance."

Cassell:—"CALIPASH, *n.* That part of a turtle next to the upper shell, containing a dull green gelatinous substance."

"CALIPEE, *n.* That part of a turtle which belongs to the lower shell, containing a light yellowish gelatinous substance."

Webster:—"CALIPASH, } *n.* That part of a turtle which
CALIPEE, } belongs to the upper shell is called
calipash, and that part which belongs to
the lower shell *calipee*."

Note the almost absolute identity with Cassell, including matter that *could not* have been derived from Webster, to wit, "a dull greenish gelatinous substance," and "a light yellow gelatinous substance." Copying from Cassell, and not from Webster, is here indicated. Peck, however, counts twenty (20) towards his percentage.

"ALTIMETER."

Defendant:—"An instrument for measuring altitudes trigonometrically."

Cassell:—"An instrument for measuring altitudes trigonometrically."

Webster:—"An instrument for taking altitudes geometrically, as a quadrant."

Note that the defendant's definition is absolutely identical with Cassell's, and varies from Webster in every

respect where Cassell varies, showing that Cassell rather than Webster was used. If Webster were the source, then useless changes such as "measuring" instead of "taking," and "trigonometrically" instead of "geometrically" would not have been made, for they neither shorten nor improve the definition. The only identity is in non-significant words, whose use could not well be avoided. But Peck counts six towards his percentage, including the words from Cassell which are not in Webster.

"HAMMOCK."

Defendant:—"A swinging bed usually made of network or canvas."

Cassell:—"A swinging or suspended bed made of canvas or network."

Webster:—"A kind of hanging bed."

Only the one word "bed" is common to defendant and Webster, while every word and meaning is found in Cassell. But Peck counts three (3) towards his percentage.

"SARDINE."

Defendant:—"A species of pilchard, abundant in the Mediterranean, and preserved in oil for exportation."

Cassell:—"A fish resembling a pilchard, abundant in the Mediterranean, and exported preserved in oil."

Webster:—"A Mediterranean fish of the herring family."

Note the almost complete identity with Cassell, both in words and sense; also the almost total difference of Webster, both in words and sense. "Mediterranean" is the only word common to the two books. Peck, however, counts eight (8) towards his percentage of so-called "identities," though the whole definition obviously came from Cassell, and not a word of it from Webster.

"TROPIC."

Defendant:—"One of the small circles of the celestial sphere, situated at each side of the equator, at a distance of $23^{\circ} 28'$, and parallel to it."

Cassell:—"One of the two small circles of the celestial sphere, situated on each side of the equator at a distance of $23^{\circ} 28'$, and parallel to it."

Webster:—"A name given to two parallels of latitude, one (the tropic of Cancer) being $23^{\circ} 28'$ north of the equator, and the other (the tropic of Capricorn) being $23^{\circ} 28'$ south of the equator."

Cassell, not Webster, is the obvious source of defendant's definition. But Peck counts twenty-one (21) more "identities" toward his percentage.

The foregoing are merely typical instances of what Peck calls "practical identities." They can be multiplied indefinitely. This is the basis of his *opinion*. This is what the blue ink markings *really* mean. They do not mean what Peck says they mean. The books do not bear him out. His *opinion* has no basis of fact.

The whole of these blue ink markings should be disregarded, because of demonstrated unreliability. They constitute almost one-half of Peck's alleged percentage of "identity between the two books."

Professor Peck marked in the books with black ink what he said was matter paraphrased from Webster. Inspection of the books themselves will show that there is absolutely no basis for this claim. There are no significant words or ear-marks to indicate paraphrasing; and it merely appears that both dictionaries have defined the same word, but in widely variant language, and that any dictionary might in this way be termed with equal force a paraphrase of any other dictionary. A few typical instances of what Pro-

fessor Peck has marked as paraphrases, indicating that defendant's book was based on Webster, are the following :

“ ABBÉ.”

Defendant :—“ An ecclesiastic devoted to literature.”

Cassell :—“ An ecclesiastic without a cure ; a cleric in minor orders ; generally a mere title without any definite office or responsibility.”

Webster :—“ In a monastic sense, the same as an *abbot* ; but more generally, a title in Roman Catholic countries, without any determinate rank, office, or rights. The abbés are numerous, and generally have some literary attainments ; they dress as academics or scholars and act as instructors, in colleges and private families, or as tutors to young gentlemen on their travels ; and many of them become authors.”

“ ALIMENTARY CANAL.”

Defendant :—“ The great duct which conveys food to the stomach and carries off solid excreta.”

Cassell :—“ The great tube or duct conveying food to the stomach, and carrying off solid excreta from the system.”

Webster :—“ The alimentary canal, in animal bodies, is the great duct or intestine, by which aliments are conveyed through the body, and the useless parts evacuated.”

“ ALIMONY.”

Defendant :—“ Means of living ; an allowance made by decree of court to a wife out of her husband's estate on separation, or pending an action for the same.”

Cassell :—“ The proportional part of a husband's income allowed a wife for her support on legal separation, or for other causes.”

Webster:—"An allowance made for the support of a woman, legally separated from her husband. The sum is fixed by the proper judge, and granted out of the husband's estate."

"BABOON"

Defendant:—"The popular name of a large division of monkeys, which inhabit Africa and Arabia, and are characterized by a long dog-like snout, large canine teeth, great head, rudimentary tail, large callosities on the hips, and capacious cheek pouches; an epithet of contempt."

Cassell:—"The popular name of a large division of monkeys, with long dog-like snout, great canine teeth, large natal callosities, and capacious cheek-pouches. Used as an epithet of abuse."

Webster:—"A name common to several of the larger species of monkeys, belonging to the genus *Simia*, in the class *Mammalia*, and order *primates*, according to the system of *Linnaeus*; but more recently considered as forming a distinct genus in the order *Quadrumana* and family *Simiæ*. Baboons have short tails; a long face; a broad high muzzle; dog-like tusks, or canine teeth; and naked callosities on the buttocks. They are found only on the eastern continent and adjacent islands."

"CALOTYPE."

Defendant:—"A photographic process in which the image is received on paper prepared with iodide of silver. Also called *talvotype*, from the name of the inventor."

Cassell:—"Pref. [*calo-* and *type*] [*Talbotype*]" "A process invented by Fox Talbot of producing a latent image upon sensitized paper; it is the basis of the photographic process."

Webster:—"A name given by Mr. Fox Talbot to his invention for making pictures on paper or other substances, by the agency of light."

"CAECUM."

Defendant:—"The blind gut; a pouch-like appendage of the large intestine, having one end closed."

Cassell:—"The blind gut; any blind tube."

Webster:—"In *anatomy*, the commencement of the large intestine, forming a *cul-de-sac*, or closed tube, before the insertion of the small intestine, and having near its closed extremity a small process or appendage called the *vermiform appendage* (*appendicula vermiformis*). The term *caeca* (plural) is applied to small lateral appendages of the intestinal canal, similar to the vermiform appendages, as in birds and fishes."

"CALUMET."

Defendant:—"The tobacco-pipe of the North American Indians smoked as a symbol of peace, or to ratify treaties."

Cassell:—"The tobacco-pipe of the North American Indians, used as a symbol of peace and friendship."

Webster:—"Among the *aboriginals of America*, a pipe, used for smoking tobacco, whose bowl is usually of soft red stone, like marble, and the tube a long reed, ornamented with feathers. The calumet is used as a symbol or instrument of peace and war. To accept the calumet is to agree to the terms of peace, and refuse it, is to reject them. The calumet of peace is used to seal or ratify contracts and alliances, to receive strangers kindly, and to travel with safety. The calumet of war, differently made, is used to proclaim war."

Defendant's whole proposition that its book is based on Webster rests upon Professor Peck's statement that definitions like the above prove that defendant's dictionary was taken from Webster's Dictionary.

Percentages of Identity.

The percentages of identity between defendant's book, and various other specified dictionaries, as shown by Complainant's Parallel Column Exhibit, were calculated by defendant's witness Watrous (*Rec. vol. III*, pp. 2021-2039).

The most important of these percentages, if any are important, is the percentage of defendant's book which is identical with Webster. Mawson testified for complainant that only 45% of the words of defendant's book can be found in Webster, and these not consecutively, but much scattered. Watrous testified for defendant, *on his direct examination*, that 52% of defendant's book is found in Webster (*Rec.*, p. 2023, Q. 14). But *on cross-examination*, he testified that this result was reached *by using a different and smaller denominator* than he used in calculating the other percentages. In calculating the Webster percentage, he used a smaller denominator so as to make the percentage larger; in comparing the other dictionaries, he used a larger denominator, so as to make the percentage smaller (*Rec.*, pp. 2034-2038). This witness admitted:

"x-Q. 128. The Webster percentage as given by you then does not represent the percentage of defendant's entire book, as compared with Webster?
A. No" (*Rec. vol. III*, p. 2038).

What a farce it is to call such an obvious subterfuge "rebuttal."

Taking the figures given by this witness, and using the correct denominator—the same one used by him in calculating percentage of identities with other dictionaries, the Webster percentage of identical words is 45%, exactly what complainant's witness Mawson said it was (*Rec.*, pp. 2035, 2036). This witness also testified that 61% of defendant's book was identical with the English Cassell's Dictionary, exactly what complainant's witness Mawson said it

was (*Rec.*, p. 2022). He also testified that there was an average percentage of identity between defendant's book, and six miscellaneous dictionaries, amounting to 31.49%. Mr. Mawson had fixed it at 38% (*Rec.*, p. 2026).

Defendant thus corroborates Mr. Mawson in the position that there is a large amount of similarity and identity common to all dictionaries, so that its mere existence is no proof that one was copied from another. Common errors or peculiarities, or a considerable amount of identical consecutive language, must be found to raise even an inference of copying. Defendant's expert, Prof. Rolfe, testified that two identical definitions "might be made independently by two men," and that "similarity of language is not a reliable test; or even identity of language, as to the source of a book." "The identity must be in some significant particular, some significant word, rather than a common word" (*Rec.*, pp. 2006; 1995).

What has become of the defendant's alleged proof that its book is "based" on Webster?

Peck's New Marked Volume Exhibits.

Prof. Peck, in rebuttal, marked two hundred pages of defendant's book in red, blue, and black ink, to indicate what he termed "identities," "practical identities" and "paraphrases," with or of corresponding matter in Webster. He testified that he counted all the words so marked and that "the correct amount of identity between the two books" is 67.6%, and that Mawson's estimate of 45% was not correct. (*Peck, Rec.*, pp. 1955-1958. Qs. 31, 32). That looks like rebuttal. But it is not true. The witness on cross-examination admitted that it is not true.

x-Q. 82. The question is, do the words which you marked in any way upon the two hundred pages constitute as much as approximately 67.6% of all the matter contained upon those pages? A. No; that represents 67.6% of what I regard as the Webster matter on those pages.

x-Q. 83. Then you do not mean to testify that 67.6% of defendant's entire volume was or might have been derived from Webster? A. Why, no;

where the titles were not in Webster, or even so in our book, it could not be.² *Pack's* reply to *Dr. Bee*, p. 127. *Also Bee*, pp. 128-129.

The witness could not, and did not, state what proportion of defendant's book was thus excluded from his calculation (*Pack*, 2 Qs. 62-63, *Bee*, pp. 127-128).

This is the same advantage asserted to by the witness Watson, who used a different and smaller percentage to increase the alleged Webster percentages. Watson based his calculations upon defendant's entire book. *Pack* based his calculations upon only an undivided part of defendant's book. Of course, this method produced large figures, but those figures mean nothing. *Pack* says the marked portion of defendant's book contains 1,200 titles and definitions, of which 1,200 titles are not contained in or defined in any form in the 1847 edition of Webster. The amount of matter in these definitions does not appear, but it is plain that approximately 25% of the defendant's book was wholly excluded from *Pack's* calculations (*Pack*, Q. 25, *Bee*, p. 127). But even this twenty per cent. (25%) does not represent all the discount which must be made from *Pack's* figures. These marked volumes are all of a piece with *Pack's* former "Exhibit C," and contain the same kind of false and misleading meanings which have been illustrated.

Apparently, the principal aim was to get plenty of ink upon the books. Thus, the words and the designation of the part of speech as "adj.," "n.," "adv.," or "v." are habitually marked in red, although no part of the definition of such words are ever claimed to have been taken from Webster. These instances have not been counted, but are very numerous. Seventy-four (74) such instances appear under the letter "A" alone. The ink makes a very striking appearance, but affords no evidence that Webster was used. *Pack* himself admits this and that it would have been large and to have made such marks. How much the contributed to *Pack's* percentages does not appear (*Bee*, 106-107).

Pack says that in getting his alleged percentages (6, 24%)

6 Identity between the two bodies² is essential to the
and essential to the identity (Pr. 4. 171). Hence
one of the bodies must be in the essential or "Principle"
order of existence, and the other in the "Principle" of
it. The essentiality of the body must then be the
essentiality of the body, according to the essentiality of
the body.

That which is essential to the body is essential to the body	Principle of the body
That which is essential to the body is essential to the body	Principle of the body
That which is essential to the body is essential to the body	Principle of the body
That which is essential to the body is essential to the body	Principle of the body

6 The two bodies, each as a distinct and essential
part of the body, are then the body as a whole, and
each "essential identity" between the two bodies is
only the two essentially one as body, because each
of the two bodies is a body and a body. The
essence of identity with itself is essential, and the
two bodies are then in different languages.

Each language, essential to the body, is essential to the
body, and "essentiality" is essential to the body. The
two bodies are then the body, as the body is essential to
essential identity. Hence each of the two bodies is
essential, and each is essential to the body. The
two bodies are then the body, as the body is essential to
essential identity, and the body is essential to the body.

That which is essential to the body is essential to the
body, and the body is essential to the body. The
body is then the body, as the body is essential to
essential identity, and the body is essential to the body.
The body is then the body, as the body is essential to
essential identity, and the body is essential to the body.

Principle 5. The
Essentiality of the body



Office Supreme Court, U. S.

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CLERK

Supreme Court of the United States,

OCTOBER TERM, 1914—No. 217

G. & C. MERRIAM COMPANY,

Complainant-Appellant,

vs.

SYNDICATE PUBLISHING COMPANY,

Defendant-Appellee.

Brief on Behalf of Defendant-Appellee.

With Reference Appendix of Facts in Volume II.

Vol. I.

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SUPREME COURT OF THE UNITED STATES.

G. & C. MERRIAM COMPANY,
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VS.

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PANY,
Defendant-Appellee.

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SUPREME COURT OF THE UNITED STATES.

G. & C. MERRIAM COMPANY,
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v.

SYNDICATE PUBLISHING COM-
PANY,
Defendant-Appellee.

October Term, 1914.
No. 217.

**BRIEF FOR SYNDICATE PUBLISHING
COMPANY, DEFENDANT-APPELLEE.**

Statement.

This is an appeal from the affirmance by the Circuit Court of Appeals for the Second Circuit, of a final decree of the District Court for the Southern District of New York dismissing the complaint on the merits with costs.

The appellant and the appellee are publishers of dictionaries.

The appellant, claiming that "Webster's" is its trade-name, sought to enjoin the appellee from using that name in the title of its dictionary, entitled, at one

time, "Webster's New Illustrated Dictionary with U. S. Census and Maps" and entitled, at another time, "Webster's New Standard Dictionary with U. S. Census and Maps," and asked for an accounting of the profits, realized by the defendant from the sales thereof, amounting to from \$50,000 to \$100,000.

The appellee claims that, as a matter of law, the name "Webster's" is a public name in which no one can possess or acquire exclusive or semi-exclusive (secondary meaning) rights, because the name is the descriptive title of Noah Webster's copyrighted lexicographical writings, all of which are in the public domain.¹

Apart from the above legal grounds, appellee claims that, as a matter of fact, the name "Webster's" is a generic name for the literary product of the great lexicographer, Noah Webster; that the name still is in wide public use daily in that sense, and hence is not susceptible of exclusive or semi-exclusive appropriation by anyone engaged in the dictionary business. It claims that "Webster's," as part of the title of a dictionary, indicates Webster's authorship of matter contained in the book, and, therefore, that, as it publishes a dictionary the principal part of which is Webster's work, it may use "Webster's" as part of the title thereof to indicate that fact; for that is the usual, natural and necessary mode of describing the contents of a book.

While the pretended purpose of this suit is to enjoin the use of the name "Webster's" as part of the title of the particular book above named, that is not its real

purpose; for the plates of that book were destroyed¹ before June 14, 1912,² at the time when appellee began to publish its "New Websterian Illustrated," a dictionary compiled by Prof. Henry Thurston Peck and other editors from the 1847 Webster's Dictionary, and modern sources, the preparation of which was begun before any threat of suit was made.⁴

The real purpose of this suit is to secure, if possible, a judicial recognition of appellant's claim to superior rights in the name "Webster's" which would entitle it to forbid or regulate the use of that name by any of its numerous competitors as a part of the titles of their revisions, abridgements or amplifications of Noah Webster's work.

The District Court⁵ and the Circuit Court of Appeals⁶ expressly and emphatically refrained from recognizing appellant's claim that "Webster's" had a secondary meaning indicating appellant's dictionaries,⁷ but deemed it unnecessary to decide that point, holding that, even if appellant had superior rights in that name, appellant's inequitable conduct called for a dismissal of the complaint. That conduct, briefly stated, was as follows:

In 1904 a suit was filed against appellant by one

¹ This Point is discussed at page 51 of this brief.

² Rec., Vol. III., fol. 6251; Vol. II., fol. 4366.

³ Rec., Vol. II., fol. 6135.

⁴ Rec., Vol. III., fols. 6251 to 6266.

⁵ Rec., Vol. III., fols. 8272 to 8275.

⁶ Rec., Vol. III., page 2094.

⁷ Judge HAND's opinion, Rec., Vol. III., fols. 8271-8274. Judge NOYES' opinion, Rec., Vol. III., page 2094.

Ogilvie, as the result of which appellant was perpetually enjoined from

“in any manner claiming that it, the defendant, or any other person, firm or corporation claiming under or through it, has exclusive right to the use of the name ‘Webster’s’ in the title of dictionaries” (190 Fed. R., at p. 931).

When appellee first published its dictionary, in February, 1909, it sent a copy thereof to appellant, and a friendly correspondence ensued, during which no objection was made to appellee’s use of the name “Webster’s;” no claim was made that that name had a secondary meaning, and no objection was made to appellee’s announced plan to engage extensively in the sale of its book.

During the next two and a half years appellee sold over a million copies of its book and accumulated from \$50,000 to \$100,000 of profits.

Then, after a silence of nearly three years appellant made objections. Appellee, to save the expense of litigation, accommodated itself to every one of appellant’s unjust demands (such as the publication of cautionary notices)¹ only refusing to comply with its demand that appellee cease to use the name “Webster’s” absolutely. The making of that demand, in the face of the above quoted injunction, and the imposing upon appellee, under the

¹ A fac-simile of one of appellee’s cautionary notices will be found opposite page 137 hereof.

above circumstances, of the heavy expenses of this litigation, was regarded by the Court as oppressive and inequitable, and as sufficient reason for dismissing the complaint.

The court below did not trouble itself to determine whether the principal part of the contents of appellee's book was of Noah Webster's authorship, but held that it was sufficient for the purposes of this case that appellee's book had the same right to be called "Webster's" that appellant's books had, namely, each was directly descended by successive revisions from Noah Webster's dictionary. The court held that it did not lie in appellant's mouth to question appellee's right to use the name "Webster's" in the title of its book on the ground which appellant argued, namely, that the principal part of its contents was not Noah Webster's work, when appellant was using that name in the title of its latest and most important work, entitled "Webster's New International Dictionary",—although it was a book which its own witness testified was "OF ALMOST TOTALLY DIFFERENT LITERARY CONTENTS FROM ANY BOOK WITH WHICH NOAH WEBSTER HAD ANYTHING TO DO"¹.

¹ Judge HAND's opinion, Record, volume III., page 2061, folio 8244; also Rec., Vol. I., folio 701.

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1891- Appellant made similar efforts with similar results (47 Fed., 411).

1892- Appellant made similar efforts with similar results (49 Fed., 944).

1904- Appellant made similar efforts with similar results (136 Fed., 477).

1904- Still determined to monopolize the Webster Dictionary business appellant resolved to make its competitors pay or apprehend having to pay heavy legal expenses to remain in the business. Accordingly it began to circulate letters in the trade threatening to sue anyone who handled dictionaries entitled "Webster's" except its own. One Ogilvie, who was publishing a revised "Webster's" on which he had spent over \$100,000, sued the Merriams to restrain this unfair competition. The Merriams filed a cross-bill claiming that "Webster's" had acquired a "secondary meaning." Ogilvie secured his injunction, but was found guilty of unfair acts aside from the use of the name "Webster's," and the final result, after numerous appeals by the Merriams, was that Ogilvie was enjoined from publishing his book without a "cautionary notice"; the Merriams' threats to sue anyone who would not recognize its claim to a monopoly in the name "Webster's" were declared to be tortious and it was perpetually enjoined

"from . . in any manner claiming that it . . has the exclusive right to the use of the name Webster's in the title of dictionaries."¹

¹ 159 Fed., 638; 170 Fed., 167.

1909- Appellee began to publish its dictionary with the title now complained of viz., WEBSTER'S NEW ILLUSTRATED DICTIONARY, WITH U. S. CENSUS AND MAPS.

1909, March 20- Appellant ordered a copy of defendant's dictionary.

1909, March 22nd- Appellee presented a copy with its compliments (*infra*, p. 191).

1909, March 23rd- Appellant acknowledged receipt and suggested that "the book looks suspiciously like a book formerly issued by another concern (and which by the way is in one of our suits), but of course we would be wrong in supposing such to be the case." The letter closed with compliments on the cuts and appearance of the books and thanks for the courtesy of appellee in sending the book without charge (fols. 4289, *et seq.*).

1909, March 24th- Appellee replied to the suggestion regarding the connection of the book with a litigation, and stated "We would be under a great obligation to you for any information that would tend to show we have been been dealt with unfairly," informed appellant that its sales of the books were extensive and added "we would like to know where we stand" (fol. 4291).

1909, April 2d. Appellant replied that, when it wrote its former letter it was under an impression which it could not verify

and about which it might be mistaken, and added, in the same friendly spirit, "We shall doubtless have occasion to write to you again about your book, but we shall ask nothing but what is proper and reasonable under the court decisions, and you will, of course, expect to grant no less" (fol. 4292).

No claim was made that "Webster's" had a secondary meaning, and no criticism was made of the appellee's use of that name as part of the title of its book.

1910-11. Appellee hit upon an ingenious scheme to sell great numbers of dictionaries through newspapers. The newspapers advertised on entire pages that they would donate a dictionary to any one person who presented before a fixed date a certain number of coupons, clipped from the paper, together with a small sum of money, 48c. to 98c., according to the binding. The newspapers enthusiastically adopted the scheme because it increased their circulations. This attractive dictionary offer, tremendously advertised, the reputations of the newspapers, and the cheapness of the books, created a widespread interest and demand. The result of this ingenious scheme was the sale of 500,000 or 600,000 of appellee's books in less than a year, and the realization of profits, which made the total profits of the 2½ years aggregate from \$50,000 to \$100,000.

1911, October 4th—Appellant, after a silence of nearly three years, resolved to appropriate appellees' profits or to drive it from the business of publishing abridged revisions of Webster's work, resorted to its same methods which had been decreed tortious in the first *Ogilvie* case, viz., it began to threaten to impose the expense and trouble of litigation upon a competitor unless it wholly desisted from using the name "Websters."

Its first letter of October 4th, 1911 (fol. 4280), thinly veiled its real purpose. It did not dare to state in writing that the price of peace was a surrender of the right to trade in Webster's work, knowing that that method of suppressing competition had been decreed illegal. It charged a violation of its rights "as the prior and long established publishers of the well-known 'Webster's' dictionaries"; but carefully refrained from specifying what those rights were or in what respect defendant was violating them.

1911, October 6th—Appellee replied expressing surprise, quoting the friendly correspondence of 1909, and asking specifications as to what was criticised in its conduct (fol. 4283).

Appellee then consulted Messrs. Strong & Cadwalader, its counsel, who informed it that, in one of the *Ogilvie* cases, it had been decreed that *Ogilvie* should insert a cautionary notice in his edition of Webster's dictionary.

1911, October 9th—Hoping to avoid the possibility of any controversy, appellee inserted a similar cautionary notice on its title pages; printed its name in gold leaf on the back of its books; and wrote to the newspapers asking them to insert a cautionary notice¹ in their advertisement (*infra*, p. 196).

1911, October 15th—Receiving no reply to its letter to appellant of October 6th (complainant preferred not to reveal, in writing, its tortious purpose to compel a complete surrender of defendant's right to use "Webster's") appellee, after waiting a week, finally sent a representative to find out from the officers of appellant in what particular it was charged with violating appellant's rights. Its representative expressed appellee's willingness to comply with any reasonable requirements appellant might make, and told the appellant's officers of the insertion of the cautionary notice and title-pages and in advertisements (*infra*, p. 196). The condition of avoiding the expense and trouble of litigation was then revealed by the terms of peace the appellant's president stipulated, viz.:

"QUIT USING THE WORD WEBSTER!"
(fol. 4574).

¹ Opposite page 137 of this brief is shown a fac-simile of one of these cautionary notices. Beginning October 9th, 1911, this form and size of notice was used at least once in every newspapers campaign (fol. 7008).

1911, October 18th— Appellant wrote to appellee referring appellee to Mr. Hale, its attorney, who was, presumably, to settle the terms of a surrender to the appellant of appellee's legal right to sell Webster's work under his name.

1911, October 19th— Appellee replied to this letter repeating the facts about the insertion of the cautionary notices, etc. (fol. 4302).

1911, November 8th— Appellant did not reply to the above letter, directly, nor communicate through Mr. Hale, its attorney; but, without further warning, began the present suit.

Judge HAND expressed his opinion of the foregoing inequitable conduct as follows :

" When the defendants each approached " the officers of the complainant " in a *bona fide* effort to accommodate themselves to the utmost rights which the complainant had up to that time enjoyed they were met with a demand for absolute discontinuance of the name; they are met with it here. This was illegal and had been so adjudged against this complainant in the very decree which is the basis of any supposed right they may have in the name ' Webster ' " (see Opinion, HAND, J., fols. 8270, 8271).

B.

Within the rule of the California Fig Syrup case the complainant comes into Court with unclean hands. For that reason alone the complaint should be dismissed.

Briefly stated the basis of this Point is that the "plaintiff sought to exclude the defendant from doing just what the plaintiff had done himself,"¹ namely from labelling as "Webster's" a book which does not contain Webster's work.

Complainant's latest and principal publication is entitled "Webster's New International Dictionary." Its frontispiece is a full page portrait of Dr. Noah Webster.

The use of the generic name of Webster's work in the principal title of the book, and the displaying of his portrait as its frontispiece, convey a representation to the public that the essential content of the book is of Webster's authorship. That representation, however, is false; for the book is conceded to be

"of almost totally different literary contents from any book with which Noah Webster had anything to do" (Record, Vol. I, fol. 701, and Judge HAND's opinion, Record, Vol. III., p. 2061 fol. 8244).

¹ Justice HOLMES in the Van Der Berg case, 33 Sup. Court Rep., 165, decided Jan. 6, 1913. In the same case Justice HOLMES aptly said, "Imposition on the public is not a ground on which the plaintiff can come into court, but is a very good ground for keeping him out of it."

As Webster is regarded by the general public as the greatest of all American and, perhaps, of all English lexicographers, the false representation that the essential content of a dictionary is of Webster's authorship is a material misrepresentation. Its purpose or effect is to secure for the Merriams, by a deception, the patronage which is attracted by the public's desire to possess the product of that celebrated lexicographer. That patronage complainant has been enjoying for over half a century, during which it published Webster's work as the essential content of its dictionaries, and, during which, in its title pages, prefaces and advertisement, it has always conspicuously proclaimed Webster's authorship of the contents thereof as the great feature of its dictionaries (see *infra*, p. 95). Now that it has eliminated Webster's work from its latest book it is not willing to lose the trade which his authorship attracts. To retain that trade, it resorts to a deception.

Whatever be the other facts in the case this fact alone, within the rule of the *California Fig Syrup* case,¹ should bar the complainant from any right to relief from a Court of Equity.

The analogies of fact between the *Fig Syrup* case and the present case are so complete², that there is no

¹ Worden vs. California Fig Syrup Co., 187 U. S., 516.

² In both it appeared that a picture was used to emphasize the name; in both the popularity of the product arose from the belief that a substantial ingredient of the product was that which the name described; in both the name had originally been truthfully used. In the *Fig Syrup* case, however, it was found that defendant had imitated all of complainant's marks and style of dressing with fraudulent intent, whereas, in the present case, the only thing appellant objects to is appellee's use of the word "Webster's."

escape from the applicability of the rule there laid down, unless, indeed, appellant has proven that "Webster's" has ceased to be the generic name of Webster's lexicographical writings.

This point would still hold good even if it were true that "Webster's" had acquired an additional or secondary meaning, viz.: Merriam's book containing Webster's work as its essential content; for, if the book did not answer to the latter requirement, it still would be falsely labelled "Webster's."

Has "Webster's" in the title of a dictionary ceased to signify to the public Noah Webster's work therein contained?

Judge HAND did not find that the name "Webster's" signified to the public no closer relation to Noah Webster's work than mere literary descent therefrom through successive revisions¹. He merely held that, since appellee's book measured up at least to the test of such literary descent, and as appellant's latest book had no other relation to Webster's work than mere literary descent, it did not lie in appellant's mouth to charge appellee with deceit on the ground that its book did not contain a material component of Webster's work.

We feel that the Court could almost take judicial cognizance of the fact that whatever may, be the ideas attached by scholars to the name, to the ordinary citizen the name of this celebrated lexicographer, in the title of a dictionary, plainly describes to plain people

¹. Judge HAND's opinion (Rec., Vol. III., fols. 8242-8246).

what it plainly signifies, namely, the part of the book which the celebrated Webster wrote.¹

We find in appellant's principal brief, below, what appears to be a complete agreement with our foregoing proposition. At page 98 thereof appellant, in criticising Judge HAND for holding that John Ogilvie might have truthfully entitled his 1850 revision of Noah Webster's dictionary as a "Webster's Imperial Dictionary,"² says :

"The plain reason why he did not do so was that such a title would have been dishonest and misleading. He was publishing a dictionary which he professed to have written himself and which could only be truthfully described as having been *written* by him."³

Bearing in the mind the fact that John Ogilvie's 1850 revision of Webster's dictionary retained as its essential content most of Webster's work, we venture to suggest that it is far more "dishonest and misleading" for appellant to label as "Webster's," and so represent as *written* by Webster, a book written by others, which is "of almost totally different literary contents from any book with which Dr. Noah Webster had anything to do."

¹ Judge HAND's opinion, folio 8254.

² In the *Fig Syrup* case this Court said : "It may be true, as a scientific fact known to physicians and pharmacists, that the syrup of figs has little or no laxative property ; but this is not the belief of the general public. They purchase this preparation on the faith that it is a laxative compound made from the juice of the fig, which is false. This is not an immaterial representation the effect of which is harmless but is a representation which goes to the very essence of the plaintiff's right to a trade-mark in these words."

³ Italics in original.

At page 97 of the above brief appellant said :

“ The complainant has never even remotely denied ‘ that any *honest* compilation or abridgement at the present time of Webster’s work is entitled to describe itself as such.’ ”

If any publisher’s honest compilation or abridgement of Dr. Webster’s work is entitled to describe itself as “ Webster’s,” that *must* be because “ Webster’s ” in the title honestly represents that “ Webster’s ” work is in the book.

It is difficult to perceive how appellant could take the position that “ Webster’s ” has lost its foregoing descriptive meaning, in view of the fact that its claim that defendant’s book is falsely labelled is based on the assumption that “ Webster’s ” in its title is a false representation that its essential content is Dr. Webster’s work.

A great part of appellant’s testimony and a great part of its brief on appeal are devoted to an effort to establish the proposition that the defendant’s book does not contain as its essential content Dr. Webster’s definitions.

In Mr. Hale’s brief, filed on Final Hearing, at pages 14, 15, he claimed that “ Webster’s,” in the title of defendant’s book is a “ false representation * * * because Webster is not the author of defendant’s book.”

If “ Webster ” in the title of appellee’s book conveys a representation to the public that Webster is its principal author, the same name, in the title of appellant’s book, conveys the same representation as to the contents of its book.

Unless appellant will recede from its foregoing position that "Webster's" in the title of appellee's book represents to the public that the essential content of the book is of Webster's authorship, then it is in no position to deny that the same name, in the title of any book, including its latest book, conveys the same representation.

But were it not admitted by appellant, it is a fact, nevertheless, that "Webster's," in the title of a dictionary signifies Webster's authorship.

We claim that it has no other meaning; but it is not necessary to maintain this Point, to negative the assertion that it has acquired an additional meaning.

That the natural meaning of "Webster's" in the title of a dictionary is that the book contains Webster's work is obvious. That such was its original meaning will not be denied.

Therefore that such continues to be its meaning will be presumed unless the evidence shows conclusively that that natural meaning has been wholly lost.

The question being as to what the name means to the general public, it is of no consequence what meaning scholars or publishers attach to the name. As was said in the *California Fig Syrup* case,

"It may be true as a scientific fact known to physicians and pharmacists, that the syrup of figs has little or no laxative property; but this is not the belief of the general public."

The direct evidence of the average purchasers who were examined in this case as to their understanding of

the meaning of "Webster's" in the title of a dictionary leaves no doubt but that the name continues to mean to the public what it naturally implies.

Of 1,228 representative members of the general public selected at random by the appellee's experts, 83 per cent. of those who answered the following question, "Who do you think wrote the definitions and fixed the spelling of the words to be found in the Webster's dictionaries you have known of?" answered "Webster" or "Noah Webster."

Appellant offered the testimony of twenty-two purchasers of appellee's book chosen by it from the five or six hundred thousand who had purchased that book. It may be assumed that these witnesses were chosen as the ones most likely to sustain appellant's contention. Only two of these testified that "Webster's" meant to them a book published by the Merriams, even though containing none of Webster's work. As to these two witnesses Judge HAND said that he paid not the least attention to their testimony (fol. 8238). Twelve of the twenty-two, specifically, and the rest by clear implication showed by their answers that the name "Webster's" in the title of a dictionary meant to them that the essential content of the book was matter of which Webster was author. We append the following quotations from their testimony.

Ida Smack testified :

"Q. Does the name 'Webster' in the title suggest to you the author or the publisher? A. Why, the author.

* * * * *

"Q. As between two dictionaries one of which contains a little of that man Webster's work and another of which contains a great deal of that man Webster's work, which would you consider more closely met your requirements for a real Webster's Dictionary? A. I would consider that the one that contained a great deal of that man Webster's work to suit my requirements, as I have occasion to look at the book quite often " (fol. 1442).

Edith Fisher testified :

"Q. Then, don't you mean by the term 'Webster's Dictionary' which you expect to buy to-day a dictionary based upon the original dictionary written by Noah Webster? A. In a sense it would have to be more than 'based' on it " (fol. 1755).

She explains that she means by the foregoing that a dictionary entitled "Webster's" would mean to her that it contained more of Webster's work than the word "based" implies (fol. 1757).

Gash testified :

"Q. You bought a Webster's Dictionary because you thought that the rules of spelling laid down by Noah Webster and the definitions given in his original dictionary were correct, is that true? A. Yes " (fols. 1095, 1096).

Catherine testified :

"Q. When you bought this book did you expect to get a book written by Noah Webster himself? A. Yes, sir " (fol. 1398).

Wells testified :

" Q. Does not ' Webster's Dictionary ' really mean to you a book originally compiled by Noah Webster and brought up to date? A. Yes, sir " (fol. 1670).

" Q. Is it connected in your mind with any particular publisher? A. No.

" Q. You buy the book, then, on the reputation of the original compiler Noah Webster? A. Yes " (fol. 1671).

So much for the direct evidence. Now for the circumstantial evidence ; for that is even stronger.

Until the publication of the appellant's latest book, no dictionary was ever published with " Webster's " in its title which was not wholly or essentially of Webster's authorship.

From 1806 until 1847 all dictionaries entitled " Webster's " were wholly of Dr. Webster's authorship. Appellant says, in the preface of its 1890 edition, that its 1847 edition " was little more than the original work of 1828 brought from two volumes into one, pruned of some excrescences and with moderate additions." Appellant's next important revisions (those of 1864 and 1890) not only retained the essential part of Webster's own work, namely, his definitions of the standard words of the language, but the retention of his work, as its essential content, was proclaimed and advertised as the book's principal claim to public approval.

In the preface of its 1847 edition appellant said : " The chief value of a dictionary consists in its defini-

tions. * * * It is in this respect especially that Dr. Webster's dictionary has been generally considered superior to every other both of this Country and of England."

In the edition of 1864 (Preface, page VI.) (which it still publishes) appellant advertises that the revisers had been "studiously careful * * * to retain the exact language of the earlier edition in every case possible, esteeming very highly Dr. Webster's plain and clearly expressed definitions for their own sake as well as for that of the author and preferring to err on the side of cautious reverence rather than on that of thoughtless innovation."

In the publishers' note of the 1890 edition (which it still publishes) appellant advertises its preservation of "those definitions of standard words which were Dr. Webster's especial merit" and proclaims that the book "retains that excellence in definitions which has made Webster's the safe and familiar authority to which judge, journalist, scholars, artisan and business man refer."

Appellant still continues to publish and sell "Webster's Unabridged Dictionary," a cheaply constructed reprint of the 1864 edition, as well as "Webster's National Pictorial Dictionary," "Webster's Condensed Dictionary" and "Webster's Practical Dictionary," being three small books abridged from the 1864 edition, all of which continue truthfully to foster the natural and century-old belief, that the name "Webster's", in the titles of dictionaries, is

applied in its natural and descriptive sense, to describe matter of Webster's authorship contained in the book.

Therefore, until the publication of appellant's 1909 edition no dictionary was sold by appellant (or any one else), having "Webster's" as its principal title, which did not contain, as its essential content, Webster's own work.

From the time of its entry into the field until the publication of its latest book appellant has invited public patronage by proclaiming that its books were of Noah Webster's authorship. It always (a) proclaimed conspicuously on its title pages that its dictionaries were "*By Noah Webster LL.D.*" and described separately the supplemental matter as work by *editors* which it named; (b) it published as frontispiece a full page portrait of Webster as *author*; (c) it published Webster's original preface under the title "*Author's*" preface, the prefaces of its revisionists being separately published as "Editors' Prefaces"; (d) it published a memoir of Webster as "author" in which is forth the story of his life, with especial emphasis upon the compilation of *his* famous dictionary.

Therefore no circumstance has ever occurred, during the century that "Webster's" has been used as the title of dictionaries, to cause that name to cease to be the apt description of Dr. Webster's own work in the book.

Not only in its prefaces, but in every other way, the appellant has, for years, proclaimed the fact that its books contained Webster's work, and thereby invited the patronage which would be attracted by the

public's desire to obtain the work of that celebrated lexicographer.

As appellant's latest and principal product is falsely labelled "Webster's," and is, therefore, calculated to obtain, by deceit, the patronage of those who want a dictionary containing, as its essential content, the work of our most celebrated lexicographer, its complaint should be dismissed.

C.

Complainant has used falsehood and misrepresentation in competition with this defendant.

The only one of appellant's books which was sold in direct competition with defendant's book was "Webster's Condensed Dictionary." Like appellee's book, it was sold in newspaper premium campaigns, for from 40 to 89 cents, according to binding.

It was, and is entitled and sold as its "TWENTIETH CENTURY EDITION" (fol. 661) with the date 1911 on the title page.

The truth is, however, that this so-called "Twentieth Century" edition *was abridged and copyrighted in 1884* (fols. 2286, 2800, 3021, 3022) from *complainant's 1864 edition* (fols. 2798, 2862). It is printed from the old plates (fol. 663) with no changes in the body of the book except those made by tipping in a leaf of aeronautical terms and by punching holes in the old plates and "plugging" in a few "flash terms" of recent cur-

rency. Out of a vocabulary of 46,000 words, about 33, only, are modern words.¹

The 126 pages of "wholly new matter" referred to in appellant's brief, at page 157, was not dictionary matter, but consisted of tables of useful information, such as "Weights and Measures," "Antidotes to Common Poisons," "Postal Rates and Regulations," "Presidents and Vice-Presidents of the United States," etc., etc., corresponding to the appendix of 160 pages, at the end of appellee's book, which embodies similar tables, as well as the Constitution of the United States, Declaration of Independence, etc., etc.

The editor who in 1884 compiled this "20th Century" edition, Dorsey Gardner (see its title page), died before the Twentieth Century dawned (fol. 664).

¹ We compared 21 pages, of the alleged "Twentieth Century Edition," chosen at random (10 pages, 70 pages apart, viz., pp. 70, 140, 210, 280, etc., and 12 pages, 50 pages apart, viz., pp. 100, 150, 200, 250, 300, 350, etc., etc.), with the corresponding pages of the 1884 edition of the book. We found that these 21 pages of the alleged revision were identical with the corresponding pages of the old book, except for the substitution of three words, namely, *mercerise*, *biograph* and *bi-plane*, for words cut out to make room for them. The first two are old words which are defined in appellant's 1879 supplement to its 1864 edition. Averaged, this would mean that one word was substituted in every 7 pages of the 691 pages in the old book, or that the "Twentieth Century Edition" contained 99 words, in all, not defined in the old book. Otherwise the old vocabulary of 46,000 words remains unchanged. As two of the above three substituted words were old words, defined in the 1879 supplement, this means that there was an average of one modern word to every 21 pages, or 33 modern words, in all, in this book advertised as "a splendid up-to-date lexicon" containing "all the new words" (fol. 6883).

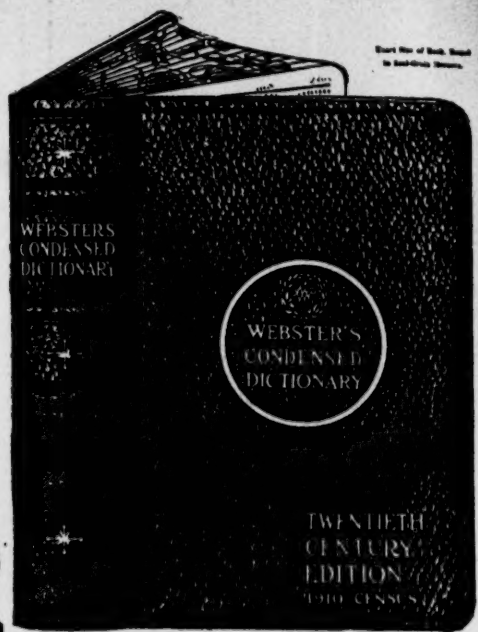
A comparison of the same 21 pages of the "Twentieth Century" with the 1864 edition, as supplemented in 1879, discloses no words in the former not defined in this still older book, except the above word *Bi-plane*, and 8 musty words, viz. *Zif*, *Prognothic*, *Bioginist*, *Bistock*, *Fauteuill*, *Vedic*, *Venu-section* and *Colocolo*.

Averaged, this would mean that the "Twentieth Century" contained only 297 words not defined in the 1864 edition, as supplemented in 1879, of which 33, only, were modern words.

The multitude of young men and women who graduated last June are taking their first business positions this fall. Fortunate indeed are those who learned to write and spell correctly. Their battle is half won in advance.



"You get the job, young man!"



It is never too late to learn—

The sooner you learn the quicker your compensation will be increased

Whenever you are in doubt as to the proper use of a word, look it up in a dictionary

It is a fine habit and you will soon begin to like it. You need—you must have a small dictionary right at your elbow; one within your reach, one that can be handled conveniently and quickly.

THE REPUBLIC gives you the opportunity of a lifetime to secure, at trifling cost, the best small dictionary in the world. You may never have another chance like this to own a genuine G. & C. Merriam Co. Webster's.

For seven coupons from seven consecutive issues of The Republic plus 40 cents —75 cents—or 89 cents (according to your choice) you can have a copy of

Webster's Twentieth Century Dictionary

Above is a picture of Offer No. 3. Exact in size, and showing the full and genuine narrow binding.

Costs you 80 cents and seven Coupons at the Dictionary Department, The Republic.

Find Coupons on another page

Webster's Twentieth Century Dictionary, bound in seal grain morocco, semi-flexible—beautiful, strong, durable, high-grade printing on high-grade paper; stamped in gold on back and sides. Besides the general contents this book contains color maps and charts as follows: General Map of the United States; General Map of the World; Flags of the Nations; Flags and Emblems of the International Order; Signal Service Order; Advertisements; Charts of the Planetary System. Contains 1910 census from 7 A.M. to 1 P.M. This book regularly sells for \$4.00. Given by The Republic for Seven Consecutive Dictionary Coupons and..... **89c**

This Random Book for Free Delivery Table. By Mail 15 cents extra for delivery charges.

On the opposite page is shown a fac-simile of one of the advertisements used in marketing this old book in connection with the campaign of the *St. Louis Republic* in September, 1911. Throughout that campaign, which was carried on "by special arrangement with the G. & C. Merriam Company of Springfield, Massachusetts" (fol. 7046), made through Reilly & Britton, complainant's selling agents (fol. 2646), appellant's 1884 dictionary was represented as containing "all the new words," as a "splendid up-to-date lexicon" (fol. 6883), as a "genuine 20th Century Webster's Dictionary" (fol. 6886), as a "genuine 1911 Edition of Webster's Dictionary" (fol. 6895). It was represented as "bound in genuine full seal grain Morocco," which was untrue (fols. 6884, 6931). *It was also advertised as "a condensed form" of the "New International," published by complainant in 1909, when, in fact, it was an abridgment of complainant's 1864 book* (fol. 6892). See opposite ^{p. 77} cut from an advertisement of the *St. Louis Republic* of September 6th, 1911, in which this false statement is made.

At page 159 of its brief appellant says :

"The charge that this book was advertised as an abridgment of the 'New International' published by complainant in 1909, is incorrect."

The advertisement we refer to speaks for itself. It says :

"Webster's Twentieth Century Dictionary is published by the C. & C. Merriam Co., the

same concern that publishes the new International Dictionary. * * *

"The 'Twentieth Century' is a condensed form of the larger book, made available for more convenient and easy reference."

See reproduction of this advertisement opposite this page.

At page 160 of the brief appellant says :

"In view of the fact that both the book itself and the advertisements proclaimed that this book was originally compiled in 1884, and was based upon the unabridged Webster of 1864, it is surely absurd to claim that it was intentionally represented as an abridged of the New International of 1909."

As a matter of fact neither the book nor the advertisements "proclaimed" the date when the book was compiled, nor the date of the book from which it was abridged. On the contrary, the preface of the alleged "Twentieth Century Edition" is an exact reproduction, in all other respects of the preface of the 1884 book, with one most significant omission, namely, *the date* "New Haven, May, 1884" (Compare the Preface at p. V.).

A comparison of appellant's alleged "Twentieth Century Edition" with defendant's book will show how archaic is the vocabulary of appellant's book¹ and how

¹ Take, for example, the definition of the word "rupee" which is said in 1918 to be "coined by the East India Company at Calcutta." The East India Company went out of existence about 1860, immediately after the Indian Mutiny of 1859 (fol. 2295).

Webster's Twentieth Century Dictionary is published by the G. & C. Merriam Co., the same concern that publishes the new International Dictionary which is indorsed by the U. S. Supreme Court, the Supreme Court of Missouri, ex-Superintendent of Public Instruction, Prof. Howard A. Gass, and by leading educators throughout the country. The "Twentieth Century" is a condensed form of the larger book, made available for more convenient and easy reference.

It is beautifully illustrated; contains colored maps and charts, general maps of the United States and of the world, flags of all nations, flags and pennants of the International Code, 1,500 text illustrations and illustrations pertaining to more than fifty subjects in monotone, depicting various types and makes of aeroplanes, wireless telegraph apparatus, vehicles of modern transportation, instruments of modern warfare and latest fire-fighting apparatus.

(Exact Size.)



fresh and modern is that of appellee. This would naturally be expected in view of the fact that the literary matter of appellant's book is taken from its 1864 edition, while appellee's book was compiled in 1904 from a dictionary compiled in 1899. In 1904 appellee made 735 changes⁸ (consisting of 483 new words and revised definitions and 269 other words) in its vocabulary of 30,000 words, and it was revised from time to time (fol. 4357) under the direction of Prof. Charles Leonard Stuart of New York, Prof. Chas. Morris of Philadelphia and Prof. H. T. Peck of New York (fol. 4366).

All of the text illustrations of appellant's alleged "Twentieth Century Edition," date from 1864 or earlier.¹

The general vocabulary of appellant's so-called "Twentieth century" edition, includes a collection of musty words, for example "Aga," "Agama," "Arba-lest," "Alembic," "Alguazil," "Almeh," "Alnage," "Anime," "Aatilyssic," "Apncea," etc., while such words as "Plumcot," which at once makes the reader familiar with Mr. Luther Burbank's horticultural magic are omitted. Appellant's so-called "20th Century" edition does not define such words as "Chromosphere," "Chromogen," "N-Rays," "Kinetic," "Electron," "Wireless-telephony," "Zincode," and a host of similar

¹ Take, for example, the antiquated Columbia hand-press which is given as an illustration of a printing press. Compare with this the modern double octuple press which illustrates appellee's dictionary. Compare also the antiquated locomotive depicted in complainant's Condensed Dictionary and the reference to its smoke-stack as a "chimney." Compare also the illustrations of such common articles as "air-pump," "trombone," "sugar mill," "revolver" and "victoria."

words belonging to modern physics and applied chemistry all of which are to be found in appellee's book; nor does it define the words "Electro-Cautery" and other medical applications of electricity, nor "Germicide," "Germule," "Iodoform," "Psycotherapy," "Spirograph," "Zionism," or the new elements "Xenon," "Argon," "Crypton," or "Helium," all of which are defined in appellee's dictionary. Even such familiar words as "Electrocute," "Gingerade," "Khaki," "Roof-garden," "Subway," "Hallmark," "Malingering," and such widely current slang words as "Globe-Trotter," "Joy-ride," "Dope," "Dude," etc., all of which are defined in appellee's dictionary, cannot be found in appellant's so-called "Twentieth Century" dictionary. It is useless to multiply these lists further. Yet the holder of ill-gotten gains made by selling, as its "Twentieth Century Edition," the above 1884 compilation of its 1864 edition has the effrontery to invoke the equity of this court to protect it and the public "against fraud" consisting, it says, in appellee's selling an old book as a modern edition!¹ It solemnly admonishes the court "that especially in the interest of the public the principles of plain business morality should be enforced. The public calling for and buying a *modern* Webster's dictionary is entitled to have a genuine publication," etc.²

¹ See Appellant's Brief below, p. 49 (top).

² *Ibid.*, page 96.

If appellant should disclaim responsibility for the false advertisements, see at page 77 hereof citations of testimony showing that the false representations were its own or were made by its agent with its knowledge and sanction.

Should this court not affirm the dismissal of the complaint below, on one of the above equitable grounds, it will then consider whether or not the facts involved disclosed that appellant possesses any right or property in the name "Webster's" which entitles it to prohibit or regulate the use of that name by injunction, or which entitles it to an accounting, or both, against this appellee.

We set out below a chronological statement of the facts on which any right or property, if its exists, must rest.

POINT TWO.

Brief Statement of the Principal Facts.¹

As far as practicable, this statement will be chronological.

The facts with folio reference are more fully stated at pages 140-174 of the Appendix of this brief.

PERIOD BEFORE COMPLAINANT ENTERED THE WEBSTER DICTIONARY BUSINESS.

- 1806- Hudson & Goodwin of Hartford, and Increase, Cook & Company of New Haven published Webster's first dictionary.
- 1828- S. Converse of New York published Webster's completed work in two big volumes.

¹ This statement ends at page 48.

1834- Copyright of 1806 edition expired, and the name "Webster's" became public property as the title of his work.

1843- Webster died.

1806-47 The following publishers were engaged in publishing big and abridged "Webster's Dictionaries," viz.:

1806-40 Hudson & Goodwin, Hartford,

1806-40 Increase, Cook & Co., New Haven,

1807 and probably

thereafter J. & D., West Boston,

1828-40 " " S. Converse, New York,

1828-56 " " N. & J. White, New York,

1830 White, Gallagher & White, New York,

1833-54 F. J. Huntington, New York,

1837-54 Huntington & Co., New York,

1837-54 Huntington & Savage, New York,

1839-56 " " White & Sheffield,

1840-56 " " J. S. & C. Adams, Amherst, Mass.

1841-56 " " Harper & Bros., New York.

The circulation of the above books before 1847 was extensive, as appears by appellant's statement in its preface of the 1847 edition, that Noah Webster's books had, prior to that time, been "read by millions."

The above facts absolutely contradict the assumption of the Court, in the Ogilvie case, that appellant was the *original* publisher of Webster's Dictionary or the original publisher's successor.

PERIOD FROM APPELLANT'S ENTRY INTO THE WEBSTER DICTIONARY BUSINESS UNTIL 1889.

(For details and folio references see *infra* pp. 144-157.)

This period is separately considered because the Ogilvie decisions, holding that a secondary meaning in the name "Webster" existed, were based on the Court's erroneous assumption that appellant was the *exclusive* publisher of Webster's dictionaries from 1847 to 1889.

1847- Appellant published its first Webster's dictionary.

This book, to quote the preface thereof, "was little more than the original work of 1828 brought from two volumes into one, pruned of some excrescences, and with moderate additions."

Appellant's right to publish this book carried with it no trade-mark rights in the name "Webster." What it acquired was nothing more than a license from the owner of the copyright of the 1828 edition to publish the matter in that edition. This was the same right which the twelve publishers above named already enjoyed as licensees and continued to exercise.

1847- Webster's fame already was so great that appellant proclaimed that his *name* was more widely known than that of anyone except George Washington. (See preface of appellant's 1847 edition.)

- 1847- Webster's fame already especially attached to his definitions of the standard words of the language. (See preface of appellant's 1847 edition.)
- 1847-56- N. & J. White published Webster's dictionaries.
- 1847-54- Huntington & Co. published four different Webster's dictionaries.
- 1847-54 F. J. Huntington published Webster's dictionaries.
- 1847-54 Huntington & Savage published Webster's dictionaries.
- 1847-56 and probably thereafter, White and Sheffield published Webster's dictionaries.
- 1847-56 and probably thereafter, J. S. & C. Adams published Webster's dictionaries.
- 1847-56 and probably thereafter, Harper & Bros. published Webster's dictionaries.
- 1847-57 and probably thereafter, Mason Bros. published six different Webster's dictionaries.
- 1848-76 and probably thereafter, J. B. Lippincott & Company published five different Webster's dictionaries.
- 1864- Appellant published its first real revision of Webster's dictionary, *i. e.*, the first book entitled "Webster's," embodying revisions made by other editors without Webster's collaboration.
- 1857-92 American Book Company published Webster's dictionaries.

- 1867-92 Ivison, Blakeman & Taylor published seven different Webster's dictionaries.
- 1870- Copyright of Webster's dictionary, 1828 edition, expired.
- 1872- and later—J. Duffy's Sons Co. published Webster's dictionaries.
- 1879-1912 Hurst & Company published Webster's dictionaries.
- 1880-89 World Publishing Co. published Webster's dictionaries.
- 1885-90 Ward, Locke & Co. published various Webster's Dictionaries varying in size from Crown octavo to pocket editions.
- 1847-64 The total number of appellant's publications of Webster's dictionaries was less than the total number published by its above competitors. (See Appendix, pages 156-157.)
- 1864-90 Appellant's publications of Webster's dictionaries not shown to be greater than the number of Webster's dictionaries published by competitors. (See Appendix, pages 159-160.)
- 1890- Appellant published its second revision.

It retained unchanged "those definitions of standard words which are Dr. Webster's especial merit," and the new title Webster's "International" was given to the book to indicate the presence of new matter in it additional to Webster's work. (See Publisher's Notice of this edition.)

1847-1889- Not only is it untrue that Appellant was the "sole" publisher of Webster's dictionaries from 1847 to 1889, but there were sixteen publishers, one or more of whom was publishing during every moment of that period, and the extent of their sales exceeded the complainant's (Appendix at pp. 140-157).

1889 TO DATE.

(For details and folio references see Appendix, pp. 157-166.)

- 1889- Copyright of Appellant's Webster's Dictionary (1847 edition) expired.
- 1890- M. A. Donohue began to publish reprints of the Appellant's 1847 edition of Webster's Unabridged Dictionary, and sold over one million copies thereof (Appendix, p. 158).
- 1890- Henry G. Allen began publishing reprints of the 1847 edition.
- 1890- Brock & Rankin did the same.
- 1890- W. B. Conkey Company did the same.
- 1890- Alden & Company did the same.
- 1890- The Werner Company did the same.
- 1890- George W. Ogilvie did the same.
- 1890- Appellant sued to enjoin the use of the name "Webster's" in titles of above publications. Its claim to superior rights in the name "Webster's" was rejected by the Court as "nonsense."

Merriam vs. Holloway (43 Fed., 450).

1891- Appellant made similar effort with a similar result.

Merriam vs. Famous Shoe Co. (47 Fed., 411).

1892- Appellant made similar effort with a similar result.

Merriam vs. Texas Siftings Co. (49 Fed., 944).

For summary of above cases see Appendix, pp. 212-219.

In the 48 years from 1864 to 1912 appellant sold 1,200,000 big dictionaries. Within a few years after 1890 the above competitors had sold more than that number of big dictionaries alone. Donohue & Company alone sold over 1,000,000 copies. (See Appendix at pp. 158-159.)

1904-1912 George W. Ogilvie and his successor, Saalfield Publishing Company, extensively published a complete and much enlarged revision of the 1847 edition (*infra*, p. 158).

1890-1912 In addition to the above seven publishers of unabridged "Webster's," the following forty-four publishers published abridged editions of Webster's dictionaries (Appendix, pp. 162-166):

Allen & Co.

L. W. Walters.

Barse & Hopkins.

Allison & Webster.

Wm. Bulger.

W. B. Bechtold.

Commonwealth Publishing Co.

A. L. Burt.

Cupples & Leon Co.

W. B. Conkey Co.	Donohue, Henneberry & Co.
M. A. Donohue & Co.	Frank Bros.
Excelsior Publishing Co.	Hampden Publishing Co.
Funk & Co. of Michigan.	John Hovendon.
Geo. M. Hill & Co.	Laird & Lee.
Hurst & Company.	Loomis Bros.
Lamont, O'Donnell & Co.	Madison Book Co.
David McKay.	E. E. Miles.
Marsh & Company.	Mutual Publishing Co.
Monarch Book Co.	F. Tennyson Neely.
National Publishing Co.	G. W. Ogilvie.
Geo. W. Noble.	R. S. Peale & Co.
I. & M. Ottenheimer.	Popular Publishing Co.
Peoples Publishing Co.	Syndicate Publishing Co.
Reilly & Britton.	Thompson & Thomas.
Success Publishing Co.	W. R. Van Sant.
C. C. Thomas & Co.	John C. Winston Co.
Wehman Bros.	

As compared with 3,500,000 abridged dictionaries published by appellant during this period, the aggregate sales of abridged Webster's dictionaries by these competitors vastly exceeded its own (pp. 160-7 hereof).

The American Book Company published and sold over 3,500,000 abridged dictionaries during this period (Appendix, p. 161).

Laird & Lee alone have published twelve different abridged editions of Webster's dictionaries (*Ib.*, 164-5), some of which have been adopted in the public schools of Indiana,

Illinois, Ohio, Michigan, Maryland, Kansas, Nebraska, Missouri, Oklahoma and Utah (*Ib.*, 161). As Laird & Lee are being sued for an accounting by the complainant, obviously it was impossible to secure exact proof of their sales, though there is evidence that they sold over 1,000,000 copies of the "Vest Pocket" edition alone. Appellee's sales in one year only exceeded 500,000 to 600,000 books.

In the 48 years from 1864 to 1912, appellant spent \$1,900,000 on advertising. It has issued 86,000,000 circulars (fols. 530-2).

The advertisements of appellee's dictionary alone has occupied space in newspapers which, at the current rates, would cost \$2,500,000, and, counting each newspaper as a circular, appellee has issued over 600,000,000 circulars (fols. 4542-5).

Ogilvie and Saalfeld have spent over \$125,000 in advertising; Laird & Lee claim to have spent more than the complainant; one mail order house which advertises Webster's dictionaries of various competitors of the appellant issues 7,000,000 catalogs annually (Appendix, pp. 169-170).

1904- Appellant made another unsuccessful attempt by law-suit to drive a competitor out of the Webster dictionary business.

Merriam vs. Straus (136 Fed., 477).

This was the first case in which the appell-

ant ever claimed that "Webster's" had acquired a "secondary meaning," though its continuous litigations against competitors using the name "Webster's" had been going on for fourteen years.

1904-Appellant having sought unfairly to drive competitors from the field by sending letters and circulars among the trade claiming that it had an exclusive right to use the name "Webster's," and would sue anyone invading that alleged right, Ogilvie sued to enjoin this unfair practice.

Appellant filed a cross bill claiming an exclusive right in the name "Webster" and seeking to enjoin Ogilvie from using that name.

Ogilvie obtained the injunction he prayed for, Merriams being enjoined **"from * * in any manner claiming that it * * or any person, firm or corporation claiming under or through it, has the exclusive right to the use of the name Webster's in the title of dictionaries"** (159 Fed., 638; 170 Fed., 167).

It was found that, aside from the use of the name "Webster's," the title pages and backs of Ogilvie's dictionaries had features imitative of the title pages and backs of the Merriam dictionaries, and he was accordingly enjoined. Judge COLT also found that the name "Webster's" had acquired a "secondary

meaning," indicating dictionaries published by the Merriams.

The finding was unnecessary to warrant the injunction which was granted, and it now appears, was based on two erroneous assumptions; one, that "the Merriam Company and its predecessors * * * acquired all the rights in Webster's dictionary from the heirs of Noah Webster previous to 1847," and the other "that from 1847 to 1889 the Merriams were the sole publishers of Webster's dictionaries."

We have discussed the finding of "secondary meaning" in this case at pages 60 *et seq.* of this brief.

An accounting was refused because Merriam's claims to an exclusive right in the name "Webster's" and its threats to sue those using that name were held to be tortious.

Ogilvie was entirely satisfied with the first decision in this case and did not appeal, so that in all successive phases of the Ogilvie-Merriam, Saalfeld litigation "secondary" meaning was assumed to be a settled fact.

1906—Copyright of the appellant's 1864 edition ("Webster's Unabridged") expired.

1908—The Merriam Co. sued Ogilvie's successor, the Saalfeld Company, for unfair competition, again claiming an exclusive right in the name "Websters." The

Saalfeld Company defended on the ground that it had become assignee of Ogilvie's business while the above Merriam-Ogilvie cases were being litigated, and that, therefore, the decrees therein constituted *res adjudicata*. In other words, it accepted the adjudication of "secondary meaning," in order to defeat Merriam's claim to an exclusive right in the name "Webster's." The plea of *res adjudicata* was sustained.

Merriam vs. Saalfeld (190 Fed., 927).

But an injunction was granted against Saalfeld on the ground that it had not observed the limitations of the injunction granted against Ogilvie.

1909—Defendant purchased from Louis Klopsch the plates of its present dictionary, which Klopsch had published, in a small way, under the title,

"Crown Dictionary of the English Language, Based upon the Unabridged Dictionary of Noah Webster, LL.D., etc." (Brief, p.).

Appellee made some revisions of the book and published it under the title

"Webster's New Illustrated Dictionary with U. S. Census and Maps. Revised and brought up to date, etc. Based upon the Unabridged dictionary of Noah Webster, LL.D. SYNDICATE PUBLISHING COMPANY, New York."

The name "Syndicate Publishing Company" was printed in large red letters in the customary place, on the title page, where publishers' names always appear.

The above dictionary is descended, by successive revisions, from Noah Webster's work ; and it retains, as its essential contents, Noah Webster's work.

Judge HAND found that the literary descent of the above dictionary from Noah Webster's dictionary was as follows :

John Ogilvie, in 1850, published a revision of Noah Webster's dictionary¹ entitled "The Imperial Dictionary." It was revised in 1883.² A revision of it was made by one E. D. Price and called the "British Empire Dictionary."³ In 1899 one Roe revised this book and published it as "The Crown Dictionary, Based upon the Unabridged Dictionary of Noah Webster, LL.D." The Crown dictionary was the immediate basis of appellee's book.⁴

All of appellant's present day books are separated from Noah Webster's dictionary by a greater number of intervening revisions than in the case of appellee's book.

As to the contents of appellee's book, appellant's own witness Mawson said that he had minutely examined 10 pages of this book selected at random, and he

¹ Rec., Vol. III., fols. 8250-8253.

² *Ib.*, fol. 8248.

³ *Ib.*, fol. 8248, 8249.

⁴ *Ib.*, fol. 8247.

concluded or admitted that 45 per cent. of the book was "by actual" count "absolutely identical" with "Webster's Dictionary of 1847" (fols. 2170, 2178, 2354-6).

"Appellee's witness Peck, after counting and comparing with the 1847 Webster 200 pages of this book, analyzed its contents as follows: It defines approximately 30,000 words. Of this number approximately 5,550, or about 18.5%, are new words, which were not given or defined in the 1847 Webster. The balance of 81.5%, or 24,450 words, are the only ones whose definitions could possibly be taken from Webster. 67.6% of the words used in defining this residual group of words are identical with the words used in the corresponding Webster definitions:

Summarized Analysis.

	Defendant's Estimate based on count of 200 pages.	Complainant's Estimate based on count of 10 pages.
Percentage of new words not defined by Webster	18.5%	18.5%
Percentage of definitions revised	26.5%	36.5%
Percentage of definitions kept unchanged	55%	45%
	<hr/> 100%	<hr/> 100%

The revised matter which differs from Webster consists largely of corrections in definitions of technical and scientific words inaccurately or clumsily defined by Webster.

Professor Rolfe of the University of Pennsylvania,

formerly connected with the faculty of Harvard and also of Cornell and President of both the American Philological Association and of the Classical Association of the United States (fol. 7955) whom Judge HAND referred to as "a concededly fair witness" (fol. 8256) said that he had spent a week in examining with very great care Professor Peck's markings upon which defendant's estimate of percentages was based (fol. 7962) and that his conclusion was that "they were carried out with extreme conscientiousness" (fol. 7963).

On cross-examination Professor Rolfe testified as follows :

"Q. You have stated that in your opinion you thought that, upon the whole, defendant's dictionary was properly called Webster's Dictionary. Please amplify that answer and state how and why you entertain that opinion? A. Well, first, because I was satisfied in my own mind that it contained at least fifty per cent. of material taken directly from Webster's Dictionary of 1847.

"Q. And that was based on your verification of Professor Peck's markings? A. Yes, that was based on that.

"Q. What else? A. And also some other things that occurred to me. Of course, we do not go absolutely hard and fast by red marks and so on, but as you work through a thing of that kind you get an impression. And when I got through my impression was a little stronger than the percentages would indicate, that is, as to the propriety of the use of the term" (fols. 8059 to 8060).

Appellee's dictionary follows carefully the three great Webster rules of spelling, namely, that words in "our" like "labour," "harbour," etc., should be spelled in "or;" that words in "re" like "theatre," "centre," etc., should be spelled "theater" and "center;" that words like "traveller" with a double "l" should be spelled "traveler" (fols. 3626, 7943). The trivial exceptions to this statement, five in number, have special reasons which are discussed at page 702, *infra*.

1909- Appellant published under the title "Webster's New International Dictionary," a book which they admit "IS A BOOK OF ALMOST TOTALLY DIFFERENT LITERARY CONTENTS THAN ANY BOOK WITH WHICH DR. NOAH WEBSTER HAD ANYTHING TO DO" (fols. 698-701).

1909, March 20- Appellant ordered a copy of appellee's book; appellee sent a copy with its compliments; a friendly correspondence followed, with a promise on April 2, 1909, by the Merriam's to communicate further if they had any request to make.

1910-11. A year later, appellee hit upon an ingenious scheme to sell great numbers of dictionaries through newspapers. The newspapers advertised on entire pages that they would donate a dictionary to any one person who presented before a fixed date a certain number of coupons, clipped from the paper, together with a small sum of money, 48c. to 98c., according to the binding. The newspapers enthusiastically adopted the scheme because it in-

creased their circulations. This attractive dictionary offer, tremendously advertised, the reputation of the newspapers, and the cheapness of the books, created a widespread interest and demand. The result of this ingenious scheme was the sale of 500,000 or 600,000 of defendant's books in less than a year.

The only unfair practice charged by appellant aside from the use of the name "Webster's" is based upon the advertisements, and the charge against these advertisements are all based directly or indirectly on their use of the name "Webster's."

(Full discussion of defendant's advertisements, infra, pp. 126-131.)

1911, Oct. 6th to Nov. 1st.—After a silence of two and one-half years, during which the appellee had earned from \$50,000 to \$100,000 of profits, without protest from appellant against defendant's use of the name "Webster's," appellant demanded that the use of the name be absolutely surrendered, and in spite of appellee's efforts to avoid a lawsuit by inserting cautionary notices in its title pages and advertisements, brought this oppressive suit which has subjected the appellee to the expenditure of many thousands of dollars.

1912—The titles of the dictionaries published and dealt in by appellant when the suit was filed were, and now are :

APPELLANT'S TITLES.

Unabridged dictionaries :

Webster's *Unabridged* Dictionary,
 Webster's *International* Dictionary,
 Webster's *New International* Dictionary,
 being respectively its editions of 1864, of
 1890 and of 1909.

Abridged dictionaries :

Webster's *Condensed* Dictionary,
 Webster's *Collegiate* Dictionary,
 Webster's *Little Gem* Dictionary,
 Webster's *National Pictorial* Dictionary,
 Webster's *Practical* Dictionary (Record,
 pp. 660-662),

three being abridgments of its 1864 editions
 and two of its 1890 edition. Note how differ-
 ent, from any of the foregoing titles, are the
 title of defendant's book, namely :

APPELLEE'S TITLES.

Webster's *New Illustrated* Dictionary, with
U. S. Census and Maps.

Webster's *New Standard* Dictionary, with
U. S. Census and Maps.

1912- Judge COXE granted a preliminary in-
 junction enjoining appellee from doing
 otherwise than it had been doing for
 three weeks before the suit was filed.
 He did this evidently because he

thought that no harm could be done in ordering appellee to do what it was already doing voluntarily, and he added to his opinion, "indeed, it seems for the interest of both parties that, pending final hearing, their rights shall be so fixed that there can be no room for further disagreement." He erroneously treated the finding of fact in the Ogilvie case to the effect that the name "Webster's" had a secondary meaning," as though it were an adjudication of law; but, obviously, he gave the matter of secondary meaning very little consideration, granting the temporary injunction on the practical ground that it only ordered the defendant to do what it was willing to do, and probably afforded a protection to it by fixing the rights of the parties pending the final hearing.

- 1912- The Merriams' application for a rehearing in the Saalfield case, on the question of accounting, was allowed, and a limited accounting was granted as to acts committed by the Saalfield Company *in contravention of the injunction decreed* in the Ogilvie case.
- 1913- On the final hearing of the present case Judge HAND dismissed the complaint with costs.

POINT THREE.

Appellant has failed to prove that it has any rights in the name " Webster's " superior to those of the general public.

On the strength of the facts we have just set forth Appellant lays claim to exclusive rights, in the name " Webster's," in the dictionary business, which give it power to regulate and even prohibit the use of that name by others in that business. As to just what is the nature and basis of this alleged right the Appellant's brief is not clear. In one place it states that the law of unfair competition must control the decision of this appeal and adds that the reason for the rules of unfair competition is the existence of *property* in reputation and good will, but elsewhere it argues that even though Appellant possesses no property right in the name " Webster's ", that it is entitled to an injunction because the public have been deceived.

We submit, on the contrary, that the doctrines of unfair competition do not warrant the court in enjoining a defendant for imposing on the public unless the imposition is of *one* kind, namely, a false representation that the goods are goods of the complainant. This is the position taken by Judge HAND, which appellant criticises. It is the position of the Supreme Court as enunciated in January of this year, when Judge HOLMES, in the *Van Der Berg* case, 33 Sup. Ct., 165, said :

" Imposition on the public is not a ground on which the plaintiff can come into court."

The Supreme Court came to the same conclusion in the *Fig Syrup* case, for, though it was conceded that the public had been imposed upon, no injunction was granted.

This doctrine is easily illustrated: A coffee merchant in New York City may be detected in the act of selling some sort of bean as coffee. The public may be imposed upon. Nevertheless, no suit lies at the instance of any other coffee merchant in New York to enjoin such an act under the laws of unfair competition. Supposing the defendant here were selling as a Webster's dictionary a book which did not contain Webster's work. The other Webster's dictionary makers, including the Merriams, would have no right to an injunction prohibiting these acts merely because the public supposed that they were buying a book containing Webster's work which in fact contained none.

If we are right in this statement of the law, this complainant cannot obtain any injunction prohibiting or regulating the use which defendant makes of the name unless it can show upon the law, and upon the facts in evidence in this case that it possesses some property right in the name superior to the rights of the general public. This it attempts to do by claiming that it possesses a trade-mark or a "secondary meaning" in the name "Webster's."

Appellee maintains that such claim must be rejected as a matter of law; but that, if that proposition be not sound, that the evidence does not sustain the appellant's proposition of fact that a secondary meaning exists.

A.

As a matter of law the name "Webster's" having been dedicated to the public, as the name of copyrighted matter, can never be appropriated as a trade name, on the theory that it has acquired a secondary meaning.

The copyright of Webster's first dictionary expired in 1834; of his second, in 1870; and of his third, in 1889. The copyrights of over twenty-five other dictionaries embodying Webster's work, with various revisions, and all having the name "Webster's" as part of the title, have expired. These include all dictionaries copyrighted by the appellant before 1871; that is, *all* of its real revisions, with the abridgements based thereon, except its revisions of 1890 and 1909.

We accept the appellant's following statement at page 137 of its brief :

"It is conceded that the title of a particular book is the generic description and name of that book."

At page 75 of appellant's brief below :

"The name is just as much generically descriptive and *publici juris* during the life of the monopoly as afterwards."

"Webster's" was and is therefore the generic name of Webster's work,¹ all of which was copyrighted. Con-

¹ Appellant admits this. At page 18 of its brief it says, referring to the basic work of 1828: "This work was entitled 'An American Dictionary', * * * but upon its cover it was entitled simply 'Webster's Dictionary', by which name it was known in its time, and by which name every subsequent edition or revision has been likewise known."

sequently, " Webster's ", as a matter of law, always has been and now is generically descriptive of Webster's copyrighted writings, and it has never been nor is it now susceptible of being exclusively appropriated as a trade-mark or of being semi-exclusively appropriated as a name with a secondary trade-mark meaning ; for that would recognize a perpetual superior right by one dealer in a name which always has been and is *by law* generic and descriptive.

Black vs. Ehrich, 44 Fed., 793, argued by Roland Cox for the complainant; decided by WALLACE, J. Complainant, an Edinburgh, Scotland, concern, publishers of the Encyclopedia Britannica, and of its successive revisions, sued the defendants, who were publishing their own revision thereof in Chicago. The case was one for unfair competition. Judge WALLACE said :

" With the exception of the copyrighted articles, the Encyclopedia Britannica, 9th edition, is public property in this country at least, and a rival publisher has the right to make any use of it he sees fit. He may use any part of it, or all of it, and call it by what name he prefers. *Neither the author nor the proprietor of a literary work has any property in its name.*¹ It is a term of description which serves to identify the work, but any other person can with impunity adopt it and apply it to any other book or to any trade commodity, provided he does not use it as a false token, to induce the public to believe that a thing to which it is applied is the identical thing which it originally designated. If literary

¹ Italics ours.

property can be protected upon the theory that the name by which it is christened is equivalent to a trade-mark, there would be no necessity for copyright laws."

In *Centaur Co. vs. Heinsfurter*, 84 Fed., 955, Judge BREWER of the United States Supreme Court, who delivered the opinion (and who sat in the *Singer* case), said :

" This case turns upon the question whether the plaintiff has an exclusive right to the use of the word ' Castoria ' as a trade-mark ; for, except by the use of that word, there is no evidence in the record of anything done by defendants calculated to mislead purchasers into the supposition that they are buying an article manufactured by the plaintiff. * * * So that it cannot be pretended that they were deceiving the public with the idea that the article which they manufactured and sold was something manufactured and sold by plaintiff, unless that deception resulted from the use of the word ' Castoria.' Hence, if the defendants had a right to use the word ' Castoria ' as descriptive of the article which they were manufacturing and selling, there can be no doubt that the decree was rightly entered in their favor. Whether the defendant had a right to use this name depends on the further question whether the word ' Castoria ' is the generic name of the thing manufactured and sold, or is a mark or name used to distinguish one party by whom the thing is manufactured and sold from all other manufacturers of that thing. * * * The patent gave no right to any particular name, but simply to the exclusive

manufacture and sale. All such rights expired in 1885, and from that time forth any party has had right to manufacture and sell that particular compound, and also a right to manufacture and sell it under the name by which it has become generally known to the public; and, if to that public the article has become generally known only by a single name, that name must be considered as descriptive of the thing manufactured, and not of the manufacturer. It is true that during the life of a patent the name of the thing may also be indicative of the manufacturer, because the thing can then be manufactured only by the single person; but, when the right to manufacture and sell becomes universal, the right to the use of the name by which the thing is known becomes equally universal. It matters not that the inventor coined the word by which the thing has become known. It is enough that the public has accepted that word as the name of the thing, for thereby the word has become incorporated as a noun into the English language, and the common property of all."

A name cannot be the common property of all and at the same time have a secondary meaning which makes it the special property of one manufacturer. For, if one manufacturer has a right to prevent all other manufacturers from using a name in usual and customary ways, that is, without mortifying cautionary notices the publication of which convey to the public a suggestion of confessed inferiority, and add a heavy expense to the advertising bill, the name no longer is common property; for one manufacturer alone has the full and untrammelled enjoyment of it.

Therefore "Webster's," as the title of copyrighted matter, being, by law, a public name, no one can have nor acquire any "secondary meaning" rights in it.

B.

What is the "secondary meaning" claimed?

If the Court rejects the foregoing proposition of law, then it will be necessary to inquire what is the exact secondary meaning claimed, before an examination of the evidence is made to ascertain if such meaning exists.

In its bill of complaint appellant alleged that the title "Webster's" in a dictionary had come to signify to the public that the book "was prepared, proof-read, printed, bound and published" by it (fols. 124, 129); but it has abandoned the claim that that title signifies that it printed, bound or published the book,¹ and now claims only that the title "Webster's" signifies that the literary contents of the book was prepared by its lexicographers—in other words that "Webster's" is a *nom de plume*.

Appellant's latest and most important publication, entitled "Webster's New International Dictionary," is, to use the language of complainant's witness,

"a book of almost totally different literary contents than [sic] any book with which Dr. Noah Webster had anything to do" (fol. 701).

¹ At page 29 of its brief appellant says: "Thus, ordinarily, not one in a thousand calling for a copy of Webster's Dictionary knows or cares anything whatever about the name of the actual printer or publisher."

Appellant claims that "Webster's" in the title of the above book and in the titles of its other books does not convey to the public the idea that Noah Webster is the author of any part of the book, nor imply that the book is "based" upon Noah Webster's own work; it claims that "Webster's" has become a fanciful name which means to the public "Merriam's," and nothing more nor less.

At page 100 of complainant's brief submitted at the final hearing, Mr. Hale said, referring to the Merriam's Company's dictionaries:

"Its books are called 'Webster's' not because Noah Webster is their author—he died nearly 70 years ago; and not because they are 'based' upon Noah Webster's own work—they are substantially and almost totally different books; they are called 'Webster's' dictionaries because * * * that name has come to mean that a dictionary so marked is a book made by the Merriams."

At page 78 of his brief, on the motion for a preliminary injunction, Mr. Hale stated complainant's position as follows:

"Noah Webster is not the author of any of complainant's dictionaries, he having died more than sixty years ago. The use of the name 'Webster' upon complainant's series of new and revised dictionaries is in no manner descriptive of authorship. On the contrary, it is a purely arbitrary use of the name of a celebrated lexicographer to designate complainant's productions and to distinguish them from like publications

of others. The name has acquired that significance. Such names so used are valid trademarks."

Therefore, the fundamental question of fact before the Court is whether the name of the most celebrated of all American and, perhaps, of all English lexicographers, when used in the title of dictionaries, has wholly lost its descriptive signification indicative of Webster's authorship, and has become an arbitrary, fanciful trade name which signifies to the public nothing more nor less than that the dictionary so entitled is produced by complainant's publishing house.

Throughout the brief filed on this appeal the claim is made that the name "Webster's" has a meaning even more restricted than the above, signifying only the "recent and current copyrighted dictionaries of the complainant" (Appellant's Brief, p. 45).

This restricted meaning is claimed in order to exclude every one from the right to apply the name, without qualifying suffixes, to the various "Webster's" dictionaries copyrighted from 1806 until 1870, all of those books (including complainant's 1847 and 1864 editions) being now in the public domain.

Not only is the claim absurd on its face; but, if "Webster's" meant only the Merriam's recent and current copyrighted editions, appellant would be guilty of a fraud on the public because it is now publishing and selling the following old editions:

"Webster's Unabridged Dictionary," a cheap reprint of the 1864 edition, sold with the date 1909 on the

title page¹, three smaller books which are abridgments of the 1864 edition, but are sold with modern dates on the title pages², the International, its 1890 edition³, and two abridgments thereof⁴.

C.

Whether the alleged secondary meaning exists is a question of fact to be determined solely upon the evidence in this case; in the determination of that fact, prior adjudications cannot properly be considered by the Court.

As Lord HALSBURY said in *Cellular Co. vs. Maxton* (1899 A. C., 344), on the question whether "Cellular," as applied to cloth, had a secondary meaning :

¹ "WEBSTER'S UNABRIDGED DICTIONARY" (fol. 2644) \$2.50 to \$5. This is a cheaply constructed reprint of the 1864 edition (fols. 715, 4012), sold with the date 1909 on the title page (fol. 2844). The copyright on the 1864 edition expired in 1906; so that it is in the public domain.

² "WEBSTER'S NATIONAL PICTORIAL DICTIONARY" (fol. 2642) \$3. The main vocabulary of this book was compiled and copyrighted in 1867. The book as described in its preface (See Deft's Exhibit No. 2) is a revision and enlargement of the 1856 octavo abridgment of Webster's "American Dictionary" of 1847. The revision was made on the basis of the 1864 edition. It does not appear that the main vocabulary of this book has been revised in the slightest degree since 1867, although certain appendices were added in 1884 and 1886 (fols. 2795, 2803, 3026 and 3032). The copyright on the main vocabulary expired in 1909.

³ "WEBSTER'S CONDENSED DICTIONARY" (fol. 2644) \$1.25 to \$1.50. This book was "compiled and copyrighted in 1884" (fol. 2286) and is based upon the 1864 edition. Printed from the old plates (fol. 663) without material change it is to-day sold as the "Twentieth Century" edition of Webster's dictionary (fols. 661, 6879, 6886, 6895, 6933) with the date "1911" on the title page (fol. 4326). See Deft's Exhibit offered in evidence (fol. 4328).

⁴ "WEBSTER'S PRACTICAL DICTIONARY" (fol. 2645) 40 cts. to 80 cts. This is a little book compiled and copyrighted in 1884 (fol. 2784). It is based on the unabridged edition of 1864 (fol. 2782).

⁵ "WEBSTER'S INTERNATIONAL DICTIONARY" (fol. 2636) \$10.75. This is a large book first published in 1890.

⁶ "WEBSTER'S COLLEGIATE DICTIONARY" (fol. 2638) \$3 to \$5. This is an abridgment of the large 1890 book.

⁷ "WEBSTER'S LITTLE GEM DICTIONARY" (fol. 2640) 25 cts. to 50 cts. This is a very small pocket dictionary abridged from the large 1890 book.

" I should like to point out here that, as we are dealing with a question of fact and not of principle, no previous case can be any authority."

To prejudge this question of fact on evidence and arguments submitted in another case in which this appellee was not a party would be to deny it due process of law, especially as the question of " secondary meaning " went by default in that case, defendant preferring to " confess and avoid."

But, were the foregoing not true, there is no prior adjudication which ought to prejudice the Court in favor of the appellant's claims.

The claim of the appellant to exclusive rights or semi-exclusive rights in the name " Webster's " as used in the dictionary business has been several times before the Courts. In each of the cases in which it has been considered any such privilege has been refused them, one Court calling their claims of this sort " all nonsense " (43 Fed., 450), and another perpetually enjoining them from claiming any such exclusive right (159 Fed., 640). In one of these cases, however (*Ogilvie vs. Merriam*, 149 Fed., 856 ; 159 Fed., 167), and in another case in which the *Ogilvie* decision was held to be *res adjudicata* (*Merriam vs. Saalfeld*, 190 Fed., 927 ; 198 Fed., 369), statements occur in the opinions to the effect that the name " Webster's " had acquired a " secondary meaning ", although this holding was in no way necessary to the decision of the case in which the opinion was rendered, such injunction as was issued in the case being issued by reason of the fact that the defendant was found to be doing some unfair

act entirely aside from its use of the name "Webster's."

The first and only finding of "secondary meaning" on evidence submitted was made by Judge COLT in *Ogilvie vs. Merriam*, 149 Fed., 856.

What Judge COLT meant by "secondary meaning" is difficult to understand in view of the fact that he held that

"Ogilvie had the same right as the Merriam Company to publish and sell revised editions of Webster's work and to use the name 'Webster's' in the title, and this public right cannot be taken away or abridged on any theory of trade-mark or unfair competition, such as is now advanced by the Merriam Company. * * * When the word 'Webster' as applied to dictionaries has once become dedicated to the public, it is not again subject to exclusive appropriation as a trade-mark or trade-name, nor can the public be deprived of its use on the ground of unfair competition" (149 Fed., 863).

Also he enjoined the Merriam Co. from

"in any manner claiming that it * * * has the exclusive right to the use of the name Webster's in the title of dictionaries."

Yet, the inconsistent holding that "Webster's" had a "secondary meaning" implied that the Merriams had rights in the name superior to those of the general public and might prevent competitors from using the name in the usual way, namely, without cautionary notices. We think that Judge COLT's statement regard-

ing "secondary meaning" was an *obiter dictum*; for he granted no injunction restricting the manner of Ogilvie's use of that name as the title of his book, by requiring a cautionary notice, and the finding of "secondary meaning" was wholly unnecessary to warrant the injunction which he granted against Ogilvie's deceptive advertisements.

Ogilvie was entirely satisfied with this decision, since it imposed no restrictions on his use of the name "Webster's," and did not appeal therefrom, and in successive phases of the Ogilvie-Merriam-Saalfeld litigation he announced his acceptance of Judge Colt's finding of "secondary meaning."¹

¹ At page 2 of his brief filed on the first appeal from Judge Colt's decision (See Bar Association Records, First U. S. Circuit Court of Appeals, Vol. 135) Ogilvie's counsel said :

" The case was finally and fully heard on June 12 and 13, 1906, by Hon. LeBaron B. Colt, whose opinion was filed with the Clerk of the Circuit Court, January 9th, 1907 (Record, Vol. V., p. 3008).

" In accordance with and pursuance of this opinion a final decree was entered by direction of the court, Feb. 28, 1907 (Record, Vol. V., p. 3005), with which decree complainant Ogilvie (defendant in cross bill) appellee in this court, is content, and from which he has not taken an appeal."

In the Circuit Court of Appeals for the Sixth Circuit in the case of Merriam vs. Saalfeld on Merriam's appeal (190 Fed., 927), Saalfeld was represented by Ogilvie's former lawyer. At page 30 of his brief on that appeal Saalfeld's counsel said :

" 2. The new evidence for complainant is mainly directed to an attempt to prove propositions which, if they ever were issues, are such no longer. What is comprised in pages 97 to 116 of Record merely reasserts former evidence in the Boston suit. That included in pages 122 to 150 goes to show merely that the name ' Webster ' is connected in the public mind with complainant's dictionaries, that is, the evidence indicates ' secondary meaning ' of the name.

" That the word ' Webster ' has such secondary meaning was found to be a fact by the Circuit Court in Boston (Opinion of Justice Colt, Exhibit, Vol. V., Transcript of Record, Boston suit, p. 3009). It has not been an issue since."

Upon taking up the present case, we found, much to our surprise, that all of these statements regarding this "secondary meaning" were avowedly based solely upon Judge COLT's finding of fact in the *Ogilvie* case to the effect that "from 1847 to 1889 the Merriams were the sole publishers of Webster's dictionaries;" and upon the assumption that the Merriams were the "original" publishers of Webster's dictionaries.

Were these statements true, the Merriams might possibly have argued that, by reason of exclusive association with their publications, from the beginning until 1889, "Webster's" had acquired a "secondary meaning," indicating Merriam publications only, though a complete answer to that argument would be that the Merriams themselves had never used the name otherwise than in its original generic sense.

But these statements are unqualifiedly false.

The fact is that fifteen publishers other than the Merriams published various editions of Webster's dictionaries during the period from 1847 to 1889, and there is every reason to believe that they published a far greater number of books than did the Merriams.

In the present case another fact which has been brought to the Court's attention for the first time is that since 1889, the sales and advertisements of "Webster's" dictionaries published by Merriam's *fifty-two* competitors have greatly exceeded the sales and advertisements of the Merriam's "Webster's," and it is also true that the dictionaries entitled "Webster's" dealt in by their competitors have been sold and have been in circulation eight years longer than they

had been when Judge COLT made his finding (see *infra*, pp. 181-194).

Another fact which wholly differentiates the present case from the *Ogilvie* and *Saalfeld* cases is that, in the present case, it appears for the first time that the latest and principal publication for which the Merriams ask equitable protection is sold by them under the title "*Webster's* New International Dictionary," although their own witness testifies that it is "a book of almost totally different literary contents than any book with which Dr. Noah Webster had anything to do" (fols. 698, 701).

In the *Ogilvie* case, the Court did not have to decide, as this Court must decide in the present case, in order to justify complainant's use of the title "*Webster's*" on the above book, that "*Webster's*" has wholly lost its generic signification as the name of Webster's work, and has acquired a meaning which makes it a truthful title for a dictionary containing none of Webster's work.

Had Judge HAND or Judge NOYES found it necessary to decide whether the evidence in the present case supported the Merriams' pretensions that the name "*Webster's*" had acquired a "secondary meaning" we feel no doubt that they would have rejected that claim as wholly negated by the evidence.

Judge HAND preferred, however, to dismiss the complaint on a different ground, out of deference to the First Circuit, leaving the question of "secondary meaning" to be passed upon by a Court of equal rank. He pointed out, however, in his opinion, that the question

of "secondary meaning" was not contested before the First Circuit in the *Ogilvie* case nor before the Sixth Circuit in the *Saalfield* case, and that the findings of "secondary meaning," in those cases, were based on the fundamental errors of fact above referred to. We quote from the part of his opinion to be found in Vol. III. of the Record, at page 2068 :

"I have decided this case upon the assumption that the word, ' Webster ', had acquired a secondary meaning indicating at once the derivation of the work and its responsible compiler. That assumption I make in deference to the decision in the First Circuit, though it is in no sense authoritatively binding upon me. There are several reasons why, if it were necessary, I should not hesitate to re-examine that question of fact. In particular the defendant in that case did not contest the question, at least, after the first decision, as his briefs show, nor did he contest it in the case in the Sixth Circuit. *Moreover, the record must have been quite different in that case for Judge COLT to say that no one but the complainant published any Webster dictionaries between 1847 and 1889, a fact abundantly disproved in the case at bar.* I need not here decide the question of secondary meaning, and I accept, since it has not been necessary to question it, the result of the decision in the First Circuit, which is the first success the complainant has ever had in its long and persistent efforts to establish a monopoly over the word ' Webster.' Nevertheless, this case can never be truthfully cited as in the slightest degree contributing to the establishment of that result, or indicating that I assent in any

way to the claim of secondary meaning. That question I leave exactly as I find it, without deciding that the meaning exists, that it does not exist, that it has been proved, or that it has not been proved."

Judge NOYES, on the appeal, said :

"Taken as a whole we fully approve Judge HAND'S opinion, and upon it affirm the decree appealed from. In so doing, however, we must not be regarded as assenting to the proposition that the name "Webster's Dictionary" has a technical or secondary meaning as indicating a publication of the complainant" (Rec., Vol. III., page 2094).

Therefore we earnestly hope that this Court will approach the consideration of the question of fact of "secondary meaning" wholly unprejudiced by the decisions in the *Ogilvie* and *Saalfeld* cases.

D.

A "Secondary meaning" is a trade-mark, and exists only where a name, originally descriptive, has wholly lost its descriptive signification.

WHAT IS "SECONDARY MEANING"?

Discussion of the rules of law relating to secondary meaning is found in cases involving unfair competition of various sorts. In almost every unfair competition case the principal object sought by the plaintiff is immediate relief from unfair practices,—the question of accounting

being of decidedly secondary importance. In fact, in these cases the question of an accounting seldom arises. It is only necessary to search for cases containing rules as to accountings in unfair competition cases, to realize how rare such cases are. Despite this fact, however, there are many unfair competition cases, the deciding question in which is the existence or non-existence of secondary meaning; and the result of this is the existence of many opinions on the question of secondary meaning, which have been rendered with little or no regard to the question of accounting. Apparently these cases have been decided without full realization of the fact that some day these very decisions must inevitably be used as binding precedents in some unfair competition case of large magnitude, like the one at bar, not only as authority for injunctions against unfair practices, but as authority for the existence of rights in the owner of this secondary meaning trade-mark, one of which oftentimes is the right to demand an accounting.

In a case where the only relief sought is an injunction, it matters little on what basis the relief is granted. But in this case, the principal relief sought is not relief from unfair practices. No unfair practices on the part of the defendant have been proven, unless the mere use of the name "Webster's" was unfair. The object of this action is first, to establish a secondary meaning in the name "Webster," and, secondly, using that secondary meaning as a basis, to appropriate the profits of the various successful competitors of the complainant, through accountings, in cases similar to the

present one. If the complainant succeeds, in the case at bar, in securing a recognition of its alleged "secondary meaning" rights, it might, except for counterbalancing equities, mean a recovery of from \$50,000 to \$100,000.

It therefore becomes vitally important to know what secondary meaning is, and whether or not such a right is possessed by the complainant.

A "secondary meaning" confers a monopoly of greatest value.

The House of Lords, *Cellular Co. vs. Maxton*, 1899, A. C., pp. 339, 340, speaking, not of the exclusive rights conferred by a technical trade-mark, but of the semi-exclusive rights conferred by a secondary meaning, said :

"If a person * * is * able to acquire the right to appropriate a word or term in ordinary use in the English language to describe his goods and shut others out from the use of this descriptive term, he would really acquire a right much more valuable than either a patent or a trade-mark, for he and his successors in business would gain the exclusive right not for a limited time, as in the case of a patent, but for all time coming to use the word as applicable to goods which others may be desirous of manufacturing and are entitled to manufacture and sell as much as he is. This being so, it appears to me that the utmost difficulty should be put in the way of any one who seeks to adopt and use exclusively as his own a merely descriptive term."

But the complainant assures the court that it claims no monopoly—asks no privilege. It merely asks that the court grant an injunction just as Judge COLT did—nothing more. *But that injunction if issued on the ground that a “secondary meaning” has been established as a fact, might unjustly penalize the defendant to the extent of \$50,000 to \$100,000.*

Judge COLT in the *Ogilvie* case, neither ordered an accounting nor even required that a cautionary notice should accompany Ogilvie's use of the name “Webster's”, and the Court of Appeals of the First Circuit, before whom Judge COLT's finding was not contested, ordered no accounting, so that they had no occasion to consider the real meaning and far reaching consequences of such a finding.

Finally, however, the Circuit Court of Appeals of the Sixth Circuit, (in the *Saalfeld* case) accepting “secondary meaning” as *res adjudicata*, ordered an accounting of the defendant's profits from the sale of all its dictionaries entitled “Webster's”, assuming that a finding of secondary *should* mean, and therefore that Judge COLT's finding *did* mean

“that, in that trade and to that branch of the purchasing public, the word or phrase had come to mean that the article was his product *in other words, had come to be to them, his TRADE-MARK.*¹ So it was said that the word had come to have a secondary meaning, although this phrase, ‘secondary meaning,’ seems not

¹ Italics ours.

happily chosen, because, in the new field, this new meaning is primary rather than secondary; that is to say, it is, in that field, the natural meaning"¹ (*Merriam vs. Saalfeld*), 198 Fed., at p. 373).

The court might grant an injunction on either of two grounds:

(1) because defendant has acted unfairly, aside from its use of the Webster—a claim not seriously urged and discussed, *infra*, at pp.

(2) because it has used the name "Webster's."

To enjoin us on this latter ground the plaintiff must show some better rights in this public name than the rest of the public possess. To prove such better right, it *must* show that that this word has *lost* its original and natural meaning, indicating matter written by Webster, and that the name has now come exclusively to mean any dictionary published by the Merriams, including their last which contains practically none of Webster's work (fols. 697-701).

In a word, appellant must prove, as Judge DENISON said, that "Webster's" is its trade-mark.

The principal difference between a technical trade-mark and a "secondary meaning" trade-mark is in the method of proving that the mark indicates origin

¹ The Court said, also, that a "secondary meaning" trade-mark "differs from a technical common law trade-mark mainly, if not wholly, in the fact that the proprietor's right is not of absolute, but qualified exclusion."

² The "Uncle Sam" advertisements are discussed at pages hereof.

or ownership. The former, on its face, being free from descriptive signification, indicates origin and ownership as the result of first adoption, while the latter, being descriptive on its face, must be proven to have lost its descriptive significance in the branch of trade where it is sought to be monopolized, before any presumption can arise that its use by anyone except the privileged trader would result in deception.

Judge COXE, in his opinion below, said of the *Ogilvie and Saalfeld cases* (see discussion of these cases, Appendix, pp. 212-19):

"These decisions, *so far at least as this court is concerned*,¹ have established the following propositions:

FIRST. The name "Webster" has a two-fold signification, in that it is the generic name of the dictionary and is also associated in the public mind with the dictionaries published and sold by the Merriam Company.

This squarely raises the most important question of law herein—

Can a name which is constantly being used in some branch of the trade in its generic sense, be at the same time withdrawn from public use, in that branch of the trade, as the name of one man's goods?

Can the name "Flaked Oatmeal" be the name *both* of any and all oats that are flaked and, at this

¹ Italics ours.

same moment, mean oatmeal baked *only* by Parsons of Sydney, Australia? (198 A. C., 239.)

Can the name "Webster" be the name of Webster's work in any and all dictionaries, by whomsoever published, containing Webster's work, and, at the same moment, mean a dictionary published *only* by Merriam?

Though many loose expressions are to be found in the opinions of our lower Courts in so-called "secondary meaning" cases, we believe that no English decision nor any decision of our Supreme Court nor of our Circuit Courts of Appeals will be found holding that a "secondary meaning" can exist in a descriptive word, unless it appears "that its original or apparent meaning has been wholly lost, or does not exist amongst those who are purchasers of the goods in question" (See Kerly, p. 509, quoting LORD HERSCHELL). Or "that the public have not needed the word (Camel hair) to describe a particular kind of belting" (LORD HERSCHELL, Reddaway vs. Banham House of Lords).

The thought is expressed by "Kerly on Trade-Marks" (p. 511) as follows:

"The possibility of proving that a word which is *prima facie* descriptive is in reality a trade name, is not an exception to the well-settled rule that *no case of passing off can be made out merely by showing that the defendant has adapted and used a descriptive or other "open" word previously used by plaintiff.*¹ Any trader is

¹ Italics ours.

entitled to affix a true description to his goods in ordinary language ; but, if words are used which have LOST their ordinary descriptive meaning and have acquired a new meaning which is not descriptive, they no longer constitute a true description."

We, therefore, believe that it is not possible for any word to get this "secondary" meaning ("new primary" meaning or "trade-mark," as Judge DENNISON calls it), so long as it is still used by any considerable proportion of the public in that branch of trade in its *old* primary sense.

We have said that Webster's own writings are still largely used by the public and that "Webster's" is the only name by which Webster's writings which are still used are known. Speaking of "Castoria," a name of a patented medicine in which the patent had expired, Judge BREWER, then on the Supreme Court of the United States, said, in answer to the claim that by long user and exclusive association, during the patent monopoly, the name had acquired a "secondary meaning," indicating a medicine made by complainant :

"As well might a manufacture of flour claim a trade-mark in the word 'flour' as the manufacture of 'castoria' a trade-mark in that name" (*Centaur vs. Heinsfurter*, 84 F., 958)."

Justice BREWER also said :

"It is true that during the life of a patent the name of the thing may also be indicative of

the manufacturer, because the thing can then be manufactured only by the single person; but, when the right to manufacture and sell becomes universal, the right to the use of the name by which the thing is known becomes equally universal."

This proposition of law is frequently misunderstood, largely because of the misunderstanding of the *Camel Hair Belting* case¹ and the case of *Singer vs. June* (163 U. S., 169), both of which cases are universally cited in all unfair competition discussion of this sort.

*The Camel Hair Belting Case.*¹

The Camel Hair case is generally supposed to hold, as one of our judges has said, that "the words camel hair belting, *descriptive of a belting made of camel's hair*,² were protected against use in such a manner as to deceive purchasers," etc. (118 Fed., 965 C. C. A.).

The fact is, however, that, instead of the name being at the time the case was tried, as the Circuit Court of Appeals said, "descriptive of a belting made of camel's hair," the name, in the hair-belting trade, was wholly devoid of that descriptive significance and was wholly fanciful.

The facts in the case were these:

Plaintiff made and sold in India and elsewhere a belt made of woolen components known generally as

¹ Redaway vs. Banham 9 R. P. C. 503; on appeal, 12 Common Court of Pleas, 83, and in the House of Lords, 1896 A. C. 199, 18. R. P. C. 288.

² Italics ours.

"brown worsted yarn." As a trade name for it he used the image of a camel (by which most Indian natives recognized it) and the names "Camel," "Camel Brand," or "Camel Hair." In India, which was his principal market, different makers of beltings were identified by the names of different animals, each associated with one manufacturer, as "Yak," "Buffalo," etc. It was not known to the consumers, as far as appears, that "Camel" or "Camel Hair" described in any way the material of which the belting was composed.

Lord MacNaghten explains the *discovery* that there was camel's hair in the belting, as follows :

"The action was launched on the theory that 'Camel Hair Belting' was a fanciful term. But in the course of the trial it was proved, partly by the evidence of experts and partly by an exhibit collected from a living animal in the Zoological Gardens at Manchester, that the camel hair of commerce, of which many bundles were produced, were really and truly, for the most part, composed of genuine camel hair. This evidence seems to have come as a revelation to Reddaway and his advisers. However, they accepted the situation, and forebore to contest the doubt further. And so it was established that Reddaway's trade designation, instead of being, *as everybody supposed, a fanciful term*,¹ was nothing more nor less than a substantially accurate description of the material of which his belting was composed."

¹ Italics ours.

The Court found, however, that in the trade where Reddaway used the name, it had no descriptive signification, and was understood as a wholly fanciful name which described no fact except that the belting was made by Reddaway.

This case is the *cause celebre* of the law of secondary meaning—the most extreme case of all—and, as will be seen from what has just been quoted from the opinions, it is generally misunderstood. The fact is that the reputation of Reddaway's product under the name "Camel" or "Camel Hair" belting was acquired not when the consumers understood the belting was made of camel's hair but when he and everybody else thought that the name was a fanciful name for Reddaway's make of belting, made, not from the hair of camels, but from brown worsted yarn.

*The Singer Case.*¹

Turning now to the Singer case, we find an authority holding the term "Singer Sewing Machine" is a generic, public, open word, like "flour," or "flaked oatmeal," and at the same time holding that a manufacturing Company named Singer has the power to compel the general public to limit its use of this name *in its generic sense*.

This seems squarely in conflict with what has just been said. The reason for this is not far to seek.

A person named Singer was the founder of this

¹ 163 U. S., 169.

business in 1850. He was succeeded by the Singer Manufacturing Company, a corporation. The success of the concern had been phenomenal. Its business ran into millions of dollars annually with the inevitable result that a very valuable good will was created, which was derived partly from the patented qualities of the machines it dealt in, but largely from qualities and a reputation personal to the Singer Company as manufacturer. Those latter qualities were attached to the *owner of the good-will*, the "Singer" Company, or "Singer Manufacturing Company." It was a mere coincidence that the name of the patented article happened to be the same as the name of the manufacturer. *That coincidence in that particular instance did not change a rule of law.* This name "Singer" stood for excellence in selecting materials, skill in putting them together, fair dealings with its customers, reputation for a reliable product and notoriety from wide advertising. This good will was a most valuable asset.

In 1876 the patents expired. The evidence established that the name "Singer," though it had originally and for a long time signified solely the manufacturer of that name, had been the only name used to describe the patented machine, and therefore had come to be its only descriptive designation. As the right to make the machines was now public property the right to use the only name which described them also became public property.

The day the patent expired two rights existed.
(1) The pre-existing and still existing right of

the Singer Manufacturing Company to its good will as a manufacturer attaching to its name "Singer Manufacturing Company" or "Singer" which conferred a right to prevent any competitor from stealing that good-will by deceiving the public into the belief that such competitors' product was manufactured by the "Singer" Company; and (2) the right of the public to use the only name by which the machine was known, as its generic name.

Confusion arose in the exercise of these respective rights, and the Court held that the Singer Company would unjustly suffer injury unless those of the public exercising the right to use the name Singer *as the name of the sewing machine* exercised it in such a way as not to steal the Singer Company's good will in the word "Singer" *as the name of the manufacturing concern*.

There is nothing in the case which holds that the Singer Company had any greater rights to use the name of the sewing machine than anyone else had. If the fundamental rules of the law of trade-marks are taken into consideration in reading the case it is without sense or meaning, construed in any other way than the above.

The fact that the case is constantly misunderstood, misquoted and misconstrued, is due solely to the circumstance that in that particular instance the generic name of the machine happened to be the same as the manufacturer's name to which the good will of this corporation attached. What the Court had in mind on this point is clearly shown by the cases which it

cites, all of which goes to the proposition that a duty rested upon the defendant, *because of the similarity of the name of the manufacturer and the name of the machine*, to use the name "Singer" fairly, and sums up by laying down the general rule that where another avails himself of the right which everyone possesses to make the machine and use its generic designation

"he can do so in all forms, etc. * * * subject, however, to the condition that the name must be so used as not to deprive others of their rights or to deceive the public" (p. 200).

So far this statement of law is fully in accord with all other decisions in the law of unfair competition. The Court, however, continues,

"and therefore that the name must be accompanied with such indications that the thing manufactured is the work of the one making it as will unmistakably inform the public of that fact" (p. 200).

Two constructions can be placed upon this language:

One is that when the acts of the defendant will undoubtedly result in unfair competition from his use of the generic name of the patented article because, for instance, it happens to be the identical name of some manufacturer with whom the public has long identified the article—viz., "Singer" machines and "Singer"

Company—then “the name must be accompanied with such indications, etc.,” as are necessary to prevent a belief that the name is being used as the name of the manufacturer. That this is the proper construction is shown by the fact that the Court ordered no suffixes or other qualifying expressions to be used, but only ordered defendant (whose name was *not* Singer) to accompany its use of the name “Singer” with conspicuous markings of its name “June Manufacturing Company.”

The other construction, and one which is sometimes made, is that *every use* of a generic name of an article on which a patent or copyright has expired *must* be accompanied at least by the name of the new manufacturer.

The latter construction is obviously foolish and not that intended by the Court; for, in the *Elgin* Case it laid down the rule that, in unfair competition cases, where no word is involved which can be exclusively appropriated by the plaintiff, “the whole matter lies *in pais*” (179 U. S., 677), and, in the *Castoria* case (84 Fed., 958), Justice BREWER, who was one of the judges who sat in the *Singer* case, held that the freedom of use of the generic name *Castoria*, after the expiration of the patent, could not be in any way restricted or regulated in the absence of affirmative proof of unfair competition in some respect other than the mere use of the name.

Applying the foregoing to the case at bar, the conclusion irresistibly follows that the *Singer* case would apply here only in the event that the

Merriam's name had been "Webster Dictionary Company" or "Webster Company."¹

See "Ludlow" Valve made by Ludlow Mfg. Co., 166 Fed., 26.

"Dover" Egg Beater made by Dover Stamping Co., 166 Mass., 191.

No such coincidence as that is here present, and the general rule of trade-mark law must apply, viz. : *that no secondary meaning can exist in the name "Webster" so long as the public necessarily must use it, in the dictionary trade, to describe Webster's work.*

THE STONE ALE CASE: *Montgomery vs. Thompson*, 8 R. P. C., 361; H. L., 1891; A. C., 217.

The plaintiffs had made ale in the town of Stone for more than a hundred years. It came to be known by the name of Stone Ale. The name "Stone" was never in any sense descriptive of ale. This was merely a geographic name, used in a fanciful sense, and which had, after 100 years of exclusive user, lost, in the brewing trade, any descriptive meaning. The same is true of cases like the *Glenfield Starch* case, L. R., 5 H. L., 508; the *Waltham Watch* case, *American Co. vs. U. S. Co.*, 173 Mass., 85.

Referring to the *Camel Hair Belting* case, the *Glenfield Starch* case, etc., FULLER, C. J., has said :

"These and like cases do not sustain the proposition that words which, in their primary

¹ We have not adverted to the fact that, in the *Singer* case, defendant was found guilty of unfair practices which necessitated the regulation of its use of inevitable similarities. It is evident that no injunction would have been issued had the only alleged offense been, as here, the use of the public name.

signification, give notice of a general fact and may be used for that purpose by everyone can lawfully be withdrawn from common use *in that sense*" (Elgin vs. Illinois, 179 U. S., 965-67).

It is useless to multiply these cases in which words have been held to have acquired this secondary or "new primary" meaning in a particular branch of trade. None of them, we believe, is authority that similar rights can be acquired in a word so long as any considerable number of the public uses it, in that branch of trade, in its generic sense.

E.

Rules of law governing proof of secondary meaning.

Distinct rules of law exist which must be complied with by one who seeks to prove that a name has lost its original meaning and acquired a secondary or commercial one. They are as follows :

Rule I.

The Burden on the Complainant.

"It was for the appellants to establish, if they could, that an ordinary word in the English language properly applicable to the subject matter of the sale was one which had so acquired a technical and secondary meaning differing from its natural meaning that it could be excluded from the use of every one else. That is the proposition the pursuers had to make out."

This statement is by Lord HALSBURY, Chief Justice of England, in *Cellular Co. vs. Maxton*, 1809, A. C., 344-6-7, speaking of the fact that the case involved the question of *secondary meaning* in the name "Cellular" as applied to clothing.

Rule II.

"The utmost difficulty should be put in the way of any one who seeks to adopt and use exclusively as his own a merely descriptive term." *Cellular Co. vs. Maxton* (1899), A. C., 340).

"I still think that it should be made almost impossible for any one to obtain the exclusive right to the use of a word or term which is in ordinary use in our language and which is descriptive only; and, indeed, were it not for the decision in *Reddaway's case*,¹ I should say this should be made *altogether impossible*."²

This was said with reference to a semi-exclusive claim of right, or "secondary meaning."

"If the word or name is *prima facie* descriptive or be in general use, the difficulty of establishing the probability of deception is greatly increased" (Kerly, 274).

Rule III.

"The more clearly descriptive the name * * * the more difficult it is to make this proof," namely, that it has acquired a secondary meaning.

The above statement is by Mr. Rogers, one of the

¹ *Reddaway vs. Banham*, 1896, A. C., 190 (Lord SHAND).

² Italics ours.

counsel for the Merriams in the Saalfeld case, in an article in 3 Illinois Law Review, 553.

Kerly at page 509, continues :

“ And the more appropriate the words claimed are, as a description of the goods or of some characteristic of the goods, the greater is the burden of proof required from the plaintiff. If the plaintiff has had a monopoly in fact of the goods his difficulty is increased.”

“ “ In all these cases if the primary meaning of a word is a simple and easy primary meaning, known to everybody, it is extremely difficult to establish that in any particular trade this word has lost its well-known and original meaning, and in that trade acquired a secondary meaning to the exclusion of the natural and original meaning of the word,’ per VAUGHAN WILLIAMS, L. J., in *Hommel vs. Bauer & Co.*, 22 R. P. C., 43 (1905).”

Rule IV.

Even tho the name indicates one dealer, only, among many persons, nevertheless, if it retains its primary descriptive meaning among any considerable number of persons it has no secondary meaning.

This proposition is very clearly stated by Kerly in his recent book on Trade-Marks, page 509; in discussing, not technical trade-marks, but names which have become trade names by acquiring a secondary meaning, he says :

“ Where a word, which is not a ‘ fancy word,’ but is *prima facie* descriptive, is claimed as his

trade name by the plaintiff, he must show that its original or apparent meaning has been wholly lost, or does not exist, 'amongst those who are purchasers of the goods in question'¹ within a definite area. Such area must extend to a large part of England and Wales and include the district in which the defendant trades or purposes to trade. If the word still continues to be used and understood with its original descriptive meaning by any considerable section of such persons, it cannot be monopolized."

In *Cellular Clothing Co. vs. Maxton & Murray*, 25 Session Cases, 4th series, page 1098, at page 1109 (Inner House), LORD McLAREN said :

"The distinguishing feature of the present case is that even if we grant it proved that in the understanding of a large and respectable section of vendors and purchasers of those goods 'cellular' is accepted as a trade name for the pursuers' goods, it is also proved by an equally respectable, though perhaps numerically inferior section of the trade, that 'cellular' cloth in their estimation means only cloth woven in arrangement of small meshes or cells like the pursuers' cloth."

"And therefore when Mr. Anderson (p. 65) and Mr. Higgins (p. 71) say that they have made and sold cellular cloth under that name for years—ten years in one case—and when this evidence is confirmed by a considerable number of wholesale and retail dealers, I think it must

¹ This was L.D. HERSCHELL's phrase in *Reddaway vs. Banham* (1896), A. C., at p. 208; 13 R. P. C., at p. 227.

be admitted that the word 'cellular' has not lost its descriptive signification according to the use of the cloth trade; in other words, that the primary meaning has not been displaced by the secondary meaning which the pursuers allege and have in part proved."

Rule V.

Proof that customers of the plaintiff associate the descriptive name of the article with him does not establish the existence of a secondary meaning.

In *Shove vs. Schmincke*, 33 Ch. Div., 546, 550 (1886).

"Castle Album," was claimed to have secondary meaning as plaintiff's product but the evidence was held insufficient to show this.

Evidence was given that these words were understood in the trade to refer to plaintiff's goods, and there was also evidence to the contrary.

"But several of the plaintiff's witnesses are silent on this subject, and others who have made affidavits do not say more than that the term 'Castle Album' denotes the plaintiff's albums and no others. This may mean that the term denotes the plaintiff's goods to the witnesses themselves, which is very probable, and may be accepted as true; seeing that they are customers of the plaintiff and have received from him all the 'Castle Albums' they have bought. Thus, in their minds, the term would naturally be associated with the plaintiff and goods of his manufacture or selection. But statements to this effect fall far short of the proposition which the plaintiff seeks to establish, viz., that the term is now accepted in the market generally as designating *exclusively* his goods."

Rule VI.

Every person is charged with knowledge that anyone may publish and sell Webster's work.

"Everyone is charged with knowledge of the fact that anyone may make and sell 'Castoria.'"

Centaur vs. Marshall, 38 C. C. A., 413.

This was because the patent had expired.

Here it is because the copyright has expired.

F.

Main argument on the Question of Secondary Meaning.

The proposition of fact which the appellant must establish by a preponderance of evidence should be before the Court during every moment of its consideration of the following discussion of the evidence. That proposition of fact is :

The name "Webster's" in the title of a dictionary has lost its natural, descriptive signification as the generic name of Webster's writings, and has come to indicate solely dictionaries published by the appellant, though wholly different in literary contents from any dictionary which Webster ever had anything to do with.

Appellant has been obliged to abandon the position it took in the Ogilvie case and in its complaint in the

present suit, that "Webster's" indicated Webster's authorship, and, *at the same time*, identified the book as edited, proof-read, printed and bound by it; because now its principal publication "Webster's New International Dictionary" "IS A BOOK OF ALMOST TOTALLY DIFFERENT LITERARY CONTENTS THAN ANY BOOK WITH WHICH DR. NOAH WEBSTER HAD ANYTHING TO DO" (fols. 701, 768).

Unless "Webster's" has wholly ceased to be the generic name or Webster's writings the title of this book is, as already pointed out, a fraud on the public.

Appellant realizes this, and also knows that, under the law, a secondary meaning cannot exist in a descriptive term at the same time that it retains its primary descriptive signification in the same field. Therefore he boldly asserts that "Webster's" has no other meaning, in that field, except that the book, whatever its literary contents, is published by the Merriam concern.

As appellant has eliminated printing, binding and proof-reading from the meaning claimed, he seems to claim that "Webster's" is Merriam's *nom de plumc*, just as, during Webster's life it was Webster's *nom de plume*. If that is what he means then the name cannot be a trade-mark or quasi trade-mark, and entirely different principles of law are applicable to the case.

Black vs. Ehrich, 44 Fed., 793.

TO PROVE THAT THE GENERIC NAME OF THE LITERARY PRODUCT OF A FAMOUS AUTHOR HAS LOST ITS NATURAL MEANING IS MORE DIFFICULT THAN IN THE CASE OF ANY OTHER DESCRIPTIVE TERM, AND HAS NOT,

WE BELIEVE, HERETOFORE BEEN SUCCESSFULLY ATTEMPTED.

"The proposition that an author can protect his writings by a trade-mark is unique, and at first blush seems somewhat startling. It is certainly offensive to the aesthetic and poetic taste to place such poems as the *Recessional* of the *Last Chantey* in the same category with pills and soap." COXE, J.

Kipling vs. Putnam, 65 L. R. A., 877.

The generic name of a literary composition stands in a class by itself in the difficulty of establishing therein a secondary meaning signifying the product of one commercial house; for any manufacturer who produces the words and punctuation of a literary product produces all of it. Nothing can be added to its substance by exercise of skill by the publisher. However bound or printed it is precisely the same literary product. The manufacturer of a machine, of a pill, or such-like, may add to the qualities of the product qualities personal to him resulting from his care in the selection of materials and skill in putting them together. Consequently, qualities personal to the manufacturer might come to be denoted by the name of a machine or medicine by exclusive association of the name with his manufacture. Not so, however, with a literary product, for the reason above stated.

Appellant recognized the foregoing when it is alleged in its bill of complaint that the name "Webster's" in the title of the dictionaries had become associated ex-

clusively with its proof-reading, printing and binding (See Bill of Complaint, fol. 27). These are qualities personal to its concern and might form the basis of a trade-mark or secondary meaning. But it has made no effort to prove, and there is not a scintilla of evidence in the record tending to prove that any of the foregoing personal qualities has attached to the name "Webster's." It has abandoned, therefore, any claim that the name "Webster's" in the title of a dictionary has come to imply, in addition to its descriptive signification, describing that author's literary product, the added qualities of complainant's proof-reading, printing and binding which are 'personal to the complainant as publisher.

Consequently, it squarely stands on the proposition that this name, originally that of Webster's literary product has ceased to be the name of his writings and has come to be understood as the name of the Merriam concern's writings.

One fact which renders it impossible that Webster's name, in the title of a dictionary, should cease to describe his writings is that *the fame of Noah Webster as the author of a dictionary has been, for a century, and is, to-day, international.* When complainant began to publish Webster's work in 1847 it stated in the preface of that book that

"the name of Noah Webster from the wide circulation of some of his works is known familiarly to a greater number of inhabitants of the United States than the name probably of any other individual except the *Father of his Country.*"

Has the title "Webster's" wholly departed from that famous personality and from his famous dictionary product, and has that name wholly attached itself to one publisher, as the one identifying trade name for its various books? That is what must be proven to establish the secondary meaning which is claimed.

The appellant must further establish that the name has the foregoing meaning not among a few people, only, or in a few localities, but among the great majority of people in the United States and throughout the United States. Among every class of people and in every locality where it fails to show the foregoing extraordinary change of meaning, this Court must assume that the natural meaning remains unchanged. Every purchaser of dictionaries not shown affirmatively to be one who understands the words "Webster's Dictionary" in the foregoing alleged new and improbable sense must be considered a silent witness for the appellee who would testify, if called, that "Webster's" in the title of a dictionary means to him what it naturally signifies, namely, that the dictionary contains matter of which Webster was author.

Let us now examine the evidence to see whether appellant has discharged the almost impossible burden of proof which we have above indicated.

I.

COMPLAINANT WAS NOT THE FIRST USER OF THE TITLE "WEBSTER'S DICTIONARY."

In every case in which a secondary meaning has been adjudicated, the dealer in whose favor

such adjudication has been adjudged was substantially the original adopter of the name, in that particular trade. In the present case it is uncontradicted that for forty-one years before appellants' entry into the field, twelve other publishers had extensively published dictionaries under the title "Webster's Dictionary."¹

2.

APPELLANT WAS NOT THE SUCCESSOR OF THE ORIGINAL PUBLISHER.

We discuss this proposition, not because there is a scintilla of evidence to support the contrary, but because appellant's counsel seems to have induced the Courts in the *Ogilvie* cases to suppose that appellant derived some exclusive rights in the name "Webster" from the original publishers.

Hudson & Goodwin were the original publishers of the 1806 edition, and S. Converse & Company of the 1828 edition. Appellant was not the successor of either one of these publishers.

¹ Their names were :

- 1806-1840 Hudson & Goodwin, Hartford.
- 1806-1840 Increase, Cook and Company, New Haven.
- 1807 and later J. & D. West, Boston.
- 1828-1840 S. Converse, New York.
- 1828-1856 N. & J. White, New York.
- 1830 and later White, Gallagher & White.
- 1833-1854 F. J. Huntington, New York.
- 1837-1854 Huntington & Company, New York.
- 1837-1854 Huntington & Savage, New York.
- 1839-1853 White & Sheffield, New York.
- 1840-1853 J. S. & C. Adams, Amherst, Mass.
- 1843-1853 Harper & Brothers, New York.

Webster was a writer. He never published a single dictionary nor did his heirs. But even had they been, they could not have conferred upon the appellant any property right in the name "Webster's." As Judge WALLACE said in *Black vs. Erich*, 44 Fed. Rep., page 794:

"Neither the author nor proprietor of a literary work has any property in its name. It is a term of description which serves to identify the work."

But neither Webster nor his heirs ever attempted to confer upon the appellant any exclusive rights in the name "Webster's" as the title of a dictionary. The copyright of the 1806 edition entitled "Webster's Dictionary" had already expired in 1834 (fol. 7116), and the copyrights of every succeeding book entitled "Webster's," the publication whereof began before 1870, is in the public domain.

Appellant never acquired from Webster's heirs anything except copyright rights, and these were subject to the licenses previously conferred on various other publishers.

3.

THE WORD "WEBSTER'S" IN THE TITLE OF A DICTIONARY HAS UNIFORMLY BEEN USED AS THE NAME OF WEBSTER'S WORK IN THE BOOK FOR A CENTURY, AND THE ONLY INSTANCE OF ITS APPLICATION TO ANYTHING ELSE IS THE APPELLANT'S LATEST BOOK.

All dictionaries in circulation or published under the title "Webster's" either by appellant or by its

competitors, were, up to 1864, *wholly* Webster's work, and those published from 1864 until 1909, by appellant and its competitors, retained Webster's most famous work, his definitions of the standard words of the language. Therefore the name "Webster's" could not mean anything but Webster's work in these books.

Not classing as revisions the appellant's 1847 edition, which appellant admits

"was little more than the original work of 1828 brought from two volumes into one, pruned of some excrescences, and with moderate additions"

(See Preface to Webster's International), nor the additions, from time to time, of supplements and appendixes, the appellant's first revision of Webster's dictionary was made in 1864. It was entitled "Webster's Unabridged." Its second revision was made in 1890 and was entitled "Webster's International." Appellant still sells both of these editions (fols. 2643, 2635).

In the preface of its 1847 edition appellant said :

"The chief value of a dictionary consists in its definitions. * * * It is in this respect especially that Dr. Webster's dictionary has been generally considered superior to every other both of this Country and of England."

In the edition of 1864 (Preface, page VI.) (which it still publishes) complainant advertises that the revisers had been

"studiously careful * * * to retain the exact language of the earlier edition in every

case possible, esteeming very highly Dr. Webster's plain and clearly expressed definitions for their own sake as well as for that of the author and preferring to err on the side of cautious reverence rather than on that of thoughtless innovation."

In the publishers' note of the 1890 edition (which it still publishes) complainant advertises its preservation of

"those definitions of standard words which were Dr. Webster's especial merit"

and proclaims that the book

"retains that excellence in definitions which has made Webster's the safe and familiar authority to which judge, journalist, scholar, artisan and business man refer."

As all the Webster's dictionaries of its competitors retained this distinguishing matter, it appears that "Webster's" in the title of every dictionary published during the 58 years from 1806 until 1864 contained Webster's work, *only*, and that, from 1864 to date, all dictionaries so entitled (except appellant's 1909 edition) retained as its essential content the most important and well known part of Webster's work, namely, that body of excellent definitions of standard words which was Webster's best known and greatest product.

"Webster's" has, therefore, for 107 years, been used in trade, in its natural sense, that is, as the name of a definite and famous literary product, and could never,

under those circumstances, lose its purely descriptive or generic signification and become the name of a publishing house.

The appellant itself has always used the name "Webster's" solely to indicate the authorship of that part of the book which Webster wrote.

(a) From 1847 to 1890 always, and from 1890 until to-day on its "Unabridged" dictionary it stated in the most conspicuous type used on its title pages that the dictionary was "*by* Noah Webster, LL.D.," and it always separately described, under the names of the authors thereof, the matter contained in the book which Webster did not write ;

(b) It always inserted opposite the title page a full-page engraving of Dr. Webster ;

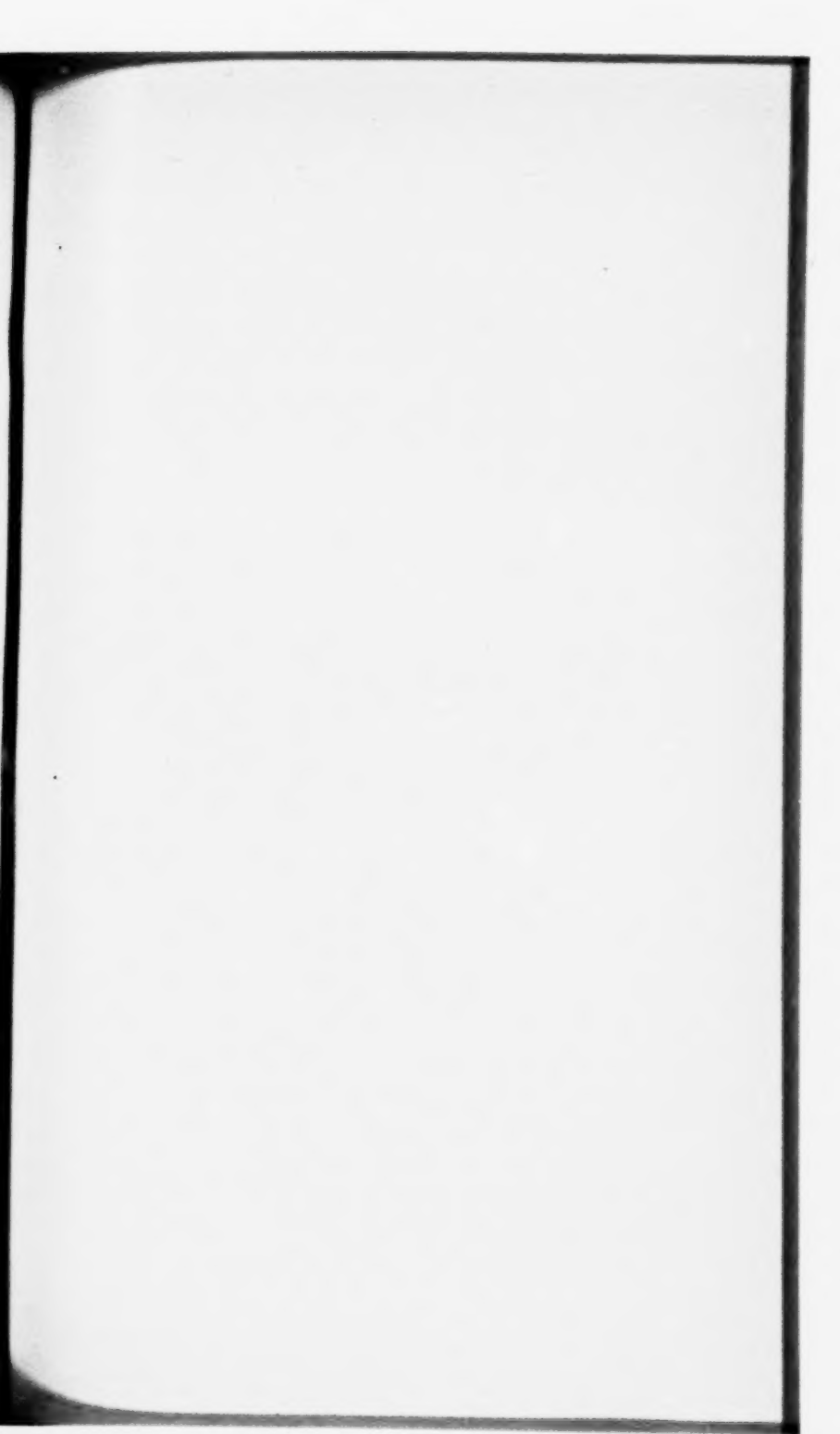
(c) It always published in each of the books a memoir of Webster, which said :

"It is natural for those who make frequent use of a work like this to desire a knowledge of the *author's* life" (itals. ours) ;

(d) It always printed after the memoirs of Noah Webster his own preface to the 1828 edition, under the title "*Author's* Preface." The prefaces which followed by Goodrich and Porter were entitled "*Editor's* Preface." (Itals. ours.)

(e) It always, from 1847 to date published, and now publishes the name "G. & C. Merriam Company" as publisher, conspicuously on its title pages, and on the backs of its books, in the usual place where a publisher's name appears.

Its advertisements and price lists always gave prom-





THIS IS YOUR GUIDE

The trade-mark is a sign of quality—a guarantee of merit. It shows that the manufacturer has confidence in his product. It puts his reputation at stake and is a mark of good faith. It usually divides the genuine, superior goods from the poor ones.

A circle is the trade-mark of the G. & C. Merriam Company. It is a guarantee of the highest merit in dictionaries. It means that a concern which has manufactured dictionaries for 67 years past puts its reputation behind any book which bears that trade-mark. There are many so-called Webster's Dictionaries, but the kind that is used in 99 per cent of the leading schools, colleges and universities of the country, the kind that is indorsed by the United States Supreme Court—the kind The Republic is offering—is the genuine Webster's Dictionaries, made by the old reliable Merriam Company, successors of the Master Mind in Dictionary building, Noah Webster, is the kind that bears the circle trade-mark on the front cover.

Why take any imitation when you can get the genuine for less?

(Exact Size.)

inence to the name "Merriam's" as *publisher*, side by side with "Webster" as *author* (fol. 2633).

On its books, letter heads, price lists and advertisements it features as its trade-mark the arbitrary symbol consisting of a "Circle, Monogram and Wreath," which is shown in the fac-simile advertisement on the opposite page (fol. 6924).

The name "Merriam," and the "Circle, monogram, and wreath," signifying wholly origin and ownership, have been its only natural trade-name and trade-mark. This name and mark have been exclusively used by it and exclusively associated with its dictionaries. The trade attached to this name and to this mark is the only trade to which complainant is exclusively entitled.

When a manufacturer puts more than one word or mark on an article and one of these clearly and positively indicates the source of manufacture, the other is *presumed* to denote the kind, class or quality, that is, to be descriptive or generic, and this is so even when the descriptive mark is of such a character as otherwise to be appropriable as a trade-mark.

Columbia Mill Co. vs. Alcorn, 150 U. S., 460, 466, 467.

Mfg. Co. vs. Trainer, 101 U. S., 51-55, 56.

Lawrence Co. vs. Tennessee Co., 31 Fed., 776, 787.

Beadleston & Woerz Co. vs. Cooke Co., 74 Fed., 229, 231, 232.

Albany Wrapping Paper Co. vs. Hoberg Co., 102 Fed., 157, 158, 159; affirmed, 109 Fed., 509, 590.

Stevens Linen Works vs. Wm. & John Don Co., 127 Fed., 950, 951.

How much the more then, when the name and arbitrary symbol of a manufacturer are coupled with a name which intrinsically cannot be appropriated as a trade mark (the name of a literary product which by expiration of copyright is in the public domain), must the presumption attach that the sole index of origin is the name or the arbitrary symbol of the maker, and that the other name is exclusively descriptive or generic.

We have a notion that our foregoing contention would be speedily adopted by the appellant if some one named Merriam should organize "The Merriam Co." to carry on the dictionary business, and should begin vending a dictionary entitled, let us say, "The People's Dictionary, published by the Merriam Company." We can imagine the array of witnesses which appellant would produce, who would swear that "Merriam" was the one identifying trade name which was associated with its trade and was familiar to every citizen of the United States who had ever used one of its books.

We can imagine how it would laugh to scorn the very claim which it makes here, that ninety per cent. of the dictionary buyers recognize "Webster's", only, as *the* one identifying symbol of dictionaries published by the appellant, and that as appellee's dictionary did not have "Webster's" in the title, it was not calculated to deceive, since practically no one knew the Merriams by their own name, but only by the name "Webster's."

(f) It always used distinctive sub-titles to indicate the work of the editors, as distinguished from the work of Webster as author of its books. Thus, when, in

1864, it published for the first time a dictionary which contained in addition to Webster's definitions of standard words, matter not written by Webster, it ceased to entitle the book merely "Webster's Dictionary" and added the new title "Unabridged" to identify the new matter; in 1890 it added the new title "International" to identify the new matter of the new edition of that year, and in 1909 it added a new title "New International" to identify the new matter in that edition. Its editions of 1864, 1890 and 1909, as it admits in one of its prefaces, were in fact "popularly known" respectively as "the Unabridged," "the International" and "the New International." In the preface of its 1909 edition occurs the following:

"A general revision *which became popularly known as the 'Unabridged'* was published in 1864." (Italics ours.)

And further:

"In 1890 appeared another complete and more radical revision of the entire volume. Its new title, 'Webster's International Dictionary,' marked the fact that the work of Webster and his successor * * * had been enriched by the scholarship of various people."

Speaking of the title, "An American Dictionary of the English language," the appellant in its 1890 edition states:

"While always hitherto retained on the title-page the adjective long ago passed out of pop-

ular use as a description of the book, which has for many years been known as the 'Unabridged.' * * *

Appellant then continues :

" Why now International ?

" Now, upon the issue of an edition so materially altered and improved as the present one is, the occasion seemed appropriate for the modification of the title."

All revised or abridged Webster dictionaries published since 1864 have borne distinctive titles to identify the matter contained in them of which Webster was not author. For instance, the abridged dictionaries in which complainant now deals are entitled " Webster's Collegiate," " Webster's Little Gem," " Webster's Condensed," etc.

Its competitors have followed the same method of identifying what was different in their various books, the name Webster's identifying the part which was common to them all.

As the appellant in conjunction with its use of " Webster's " in its titles has never ceased to proclaim Webster as the *author* of part of the book, how can it be heard to pretend that the public has not understood the name as it used it and has insisted on distorting the plain meaning of a plain term use by appellant in its plain sense, into a signification wholly different, viz., as the fanciful trade-name of a publishing house ? We submit that the *manner* of complainant's use in its books of the name of Webster's as *author* thereof, renders absolutely impregnable the presumption that it has retained that natural signification.

THE MERRIAM COMPANY'S USE OF WEBSTER IN THE TITLE OF A DICTIONARY HAS NEVER BEEN EXCLUSIVE.

Appellant began to publish dictionaries in 1847.

Publishers from 1847 to 1889.

During this period FOURTEEN concerns published Webster's dictionaries: ¹

As to the extent of appellant's business during the years 1847 till 1864, the record is completely silent. Presumably, therefore, each of its competitors sold, contemporaneously, as many dictionaries as it did, making their aggregate business much greater than appellant's.

As to its business from 1864 until 1889, the record

¹ (1) 1831-1853, or later, Harper & Brothers.

(2) 1839-1853, or later, White & Sheffield.

(3) 1840-1853, or later, J. S. & C. Adams.

(4) 1837-1854, Huntington & Company.

(5) 1837-1854, F. J. Huntington.

(6) 1837-1854, Huntington & Savage.

(The last three publishers published four different Webster's.)

(7) 1856, 1857, and later, Mason Brothers.

(This firm published six different Webster's.)

(8) 1856-1876, and later, J. P. Lippincott & Company.

(This firm published five different Webster's.)

(9) 1867-1892, Ivison, Blakeman & Taylor.

(The Webster's Dictionaries published by this firm and by American Book Company—7 in number—were those sold in the schools.)

(10) 1857-1892, American Book Company.

(11) 1872, and later, J. Duffey's Sons & Company.

(12) 1879-1912, Hurst & Company.

(13) 1880-1889, World Publishing Company.

(14) 1885-1890, Ward, Locke & Company.

throws light, by inference, but fails to show that appellant's business during that period was greater than that of its competitors.

Not only were all of the "Webster's" dictionaries sold by appellant's competitors between 1847 and 1889 in circulation during that period, but most of the "Webster's" dictionaries previously sold by other publishers (between 1806 and 1847) were in circulation, some for one part and some for another part of the period from 1847 to 1889. This resulted from the well-known fact that a dictionary remains on the shelves of its buyer or of his family and is there consulted for thirty or forty years. Prof. Peck testified that when he was a young man (about 1882-1885) he knew a number of households which possessed and used the 1828 edition of Webster's dictionary. Therefore, not only the "Webster's" published by appellant's competitors between 1847 and 1889 operated to prevent an exclusive association of that name with its publishing house, but all of the various "Webster's" published during the 41 years before 1847 and remaining on the shelves of their owners operated to prevent such exclusive association.

1889 to Date.

In 1890 M. A. Donahue & Co., George W. Ogilvie, Henry G. Allen, Brock & Rankin, W. B. Conkie Co., George M. Hill and the Werner Company published unabridged reprints of the 1847 edition.

In the 48 years from 1864 to 1912 appellant sold 1,200,000 big dictionaries. Within a few years after

1890 the above competitors had sold more than that number of big dictionaries alone. Donohue & Company alone sold over 1,000,000 copies. (Record, fol. 4188.)

From 1904 to 1912 George W. Ogilvie and his successor, Saalfeld Publishing Company, extensively published an unabridged revision of the 1847 edition.

Therefore NINE publishers have published *unabridged* "Webster's" in the last twenty-two years.

From 1890 to 1912 FORTY-FOUR publishers published *abridged* editions of Webster's dictionaries (see Appendix, pp. 162-167):

- | | |
|--------------------------------|-------------------------------|
| 1. Alden & Co. | 23. Allison & Webster. |
| 2. Barse & Hopkins. | 24. W. B. Bechtold. |
| 3. Wm. Bulger. | 25. A. L. Burt. |
| 4. Commonwealth Publishing Co. | 26. Cupples & Leon Co. |
| 5. W. B. Conkey & Co. | 27. Donohue, Henneberry & Co. |
| 6. M. A. Donohue & Co. | 28. Frank Bros. |
| 7. Excelsior Publishing Co. | 29. Hampden Publishing Co. |
| 8. Funk & Co., of Michigan. | 30. John Hovendon. |
| 9. Geo. M. Hill & Co. | 31. Laird & Lee. |
| 10. Hurst & Co. | 32. Loomis Bros. |
| 11. Lamont, O'Donnell & Co. | 33. Madison Book Co. |
| 12. David McKay. | 34. E. E. Miles. |
| 13. Marsh & Company. | 35. Mutual Publishing Co. |
| 14. Monarch Book Co. | 36. F. Tennyson Neely. |
| 15. National Publishing Co. | 37. Geo. W. Ogilvie. |
| 16. Geo. W. Noble. | 38. R. S. Peale & Co. |
| 17. I. & M. Ottenheimer. | 39. Popular Publishing Co. |
| 18. People's Publishing Co. | 40. Syndicate Publishing Co. |
| 19. Reilly & Britton. | 41. Thompson & Thomas. |
| 20. Success Publishing Co. | 42. W. R. Van Sant. |
| 21. C. C. Thomas & Co. | 43. Wehman Bros. |
| 22. M. W. Walters. | 44. John C. Winston Co. |

During this period, the aggregate sales of abridged Webster's dictionaries by competitors the Merriams' vastly exceeded its own sales (*ib.*, 158-161). Laird & Lee alone have published twelve different abridged editions of Webster's dictionaries, some of which have been

adopted in the public schools of Indiana, Illinois, Ohio, Michigan, Maryland, Kansas, Nebraska, Missouri, Oklahoma and Utah. As Laird & Lee are being sued for an accounting by the complainant, obviously it was impossible to secure exact proof of their sales, though there is evidence that they sold over 1,000,000 copies of its "Vest Pocket" edition alone. Defendant's sales in one year only exceeded 500,000 or 600,000 books.

AMOUNT OF ADVERTISING OF PARTIES HERETO.

For details and folio references see Appendix, pp. 167-170.

In the 48 years from 1864 to 1912, appellant spent \$1,900,000 on advertising. It has issued 86,000,000 circulars. The advertisements of appellee's dictionary alone have occupied space in newspapers which, at the current rates, would cost \$2,500,000, and counting each newspaper as a circular, appellee has issued over 600,000,000 circulars. Ogilvie and Saalfield has spent over \$125,000 in advertising; Laird & Lee claim to have spent more than the appellant; one mail order house which advertises Webster's dictionaries of various competitors of the appellant issues 7,000,000 catalogues annually (fol. 7154).

From the foregoing it is clear that appellant has never been the exclusive user of the name "Webster's" in the title of dictionaries, and that the association of that title has been more extensive with the publications of its competitors, both as regards the number of their books sold and the extent of their advertising, than with the Merriams

5.

SYNOPSIS OF OPINION TESTIMONY AS TO MEANING
OF NAME "WEBSTER."

We do not believe that the court will pay much attention to the opinions of the librarians and publishers who undertake to tell what understanding of the name "Webster's Dictionary" resides in the mind of the average purchaser, especially when we find that only two of the twenty-two purchasers of our book, chosen by the complainant from among 500,000 or 600,000 as most favorable to its contention, exhibit any understanding of the term which even approximately corresponds with these person's opinions on that subject.

This is the testimony to which Judge Hand said below he paid not the slightest attention.

An extended review of this opinion testimony will be found in the appellee's appendix, (pp. 174-6).

The appellant offered the testimony of seven retail booksellers, dealers in Webster's Dictionaries published by various publishers, who testify that the title does not signify any particular publisher to the ordinary purchaser. The testimony of these witnesses, with folio references, will be found at page of the above appendix.

6.

SYNOPSIS OF LETTERS FROM PERSONS ALLEGED TO
HAVE BEEN MISLED BY ADVERTISEMENTS.

Certain letters of persons claimed to have been misled by advertisements are to be found at pages 136-158 and 224-233 of the Record.

Of 52 writers *three, only*, refer to advertisements of appellee's book, namely, Carter (fol. 568), Atkinson (fol. 577), and Sipe (fol. 585). As the dates of Carter's and Atkinson's letters are December, 1911, and Sipe's letter is dated November, 1911, the advertisements they refer to contained the cautionary notice and defendant's name; therefore, as the writer's knew the Merriam's by name, they evidently read the advertisement carelessly. Sipe's statement "it is one of yours, of course" (fol. 585), shows that he knew that there were other "Webster's" besides the complainant's.

All of the other 48 letters refer to other publishers' advertisements, which are not before the Court. These letters are, therefore, wholly irrelevant; for, *non constat*, these advertisements contained all sorts of deceptive devices, wholly apart from the use of the name "Webster's."

The very fact that the circulation of 600,000,000 full pages of newspapers advertising appellee's book in the manner herein complained of resulted in the receipt by complainant of *three letters only* of persons who connected appellant with the advertisements, shows affirmatively that the title "Webster's," was not connected in the public mind with the appellant.

7.

SYNOPSIS OF TESTIMONY OF "ORDINARY PURCHASERS."

Appellant's Twenty-four Witnesses.

It should be borne in mind that appellant has been litigating the "Webster's" question for over twenty

years, and that its agents and salesmen all over the country have been engaged in collecting evidence to support its claims, under the guidance of zealous counsel.

Therefore, the alleged "deceived purchasers," whose testimony is produced in this case, must be nearly all who exist, and their testimony must be the strongest which it was possible for appellant to produce in support of its claims.

During that period millions of dictionaries entitled "Webster's" have been sold by appellant's competitors. This appellee alone sold 500,000 or 600,000 dictionaries before this suit began.

Out of the millions of purchasers of Webster's dictionaries published by its competitors, appellant produced twenty-four witnesses, alleged deceived purchasers, twenty-two being purchasers of appellee's dictionary, one (fol. 729) of the Saalfeld book and one (fol. 1551) of some other publisher's book.

To get these 24 witnesses it went to five cities. Seven of the 24 were from Springfield, appellant's home; nine from Brooklyn; three from Buffalo; four from New York; and one from St. Louis—scarcely a representative group geographically, when the burden of proof is on the appellant to negative the strong presumption that "Webster's" means to the average purchasers throughout the United States what it originally and naturally implied.

Two, Neuchterlein (fols. 1776-1798) and Haggarty (fol. 1766), testified specifically that they were not deceived.

Nine of the twenty-four, namely, Boynton (fol. 729), Cowles (fol. 405), Clark (fol. 750), Crossman (fol. 820), Hrggarty (fol. 1766), Kronvall (fol. 840), Pulsifer (fol. 832), Rogers (fol. 782), and Seybel (fol. 997), knew the Merriams by name as publishers. Had they examined the book they would, of course, have seen that the Merriams were not the publishers of it, but none of them did so.

Two, only, out of the entire 24, namely, Cowles and Clark, testified that "Webster's" in the title of a dictionary meant to them not Webster's work, but dictionaries published by the Merriams only. Judge HAND stated in his opinion that he paid not the slightest attention to the testimony of these two witnesses (Rec., fol. 8238).

With the exception of the above two none negated the presumption that "Webster's" as the title of a dictionary meant to him what it naturally signifies, namely, a dictionary the distinguishing contents of which are *by* Webster. On the contrary, eleven who were asked the question directly testified that Webster's in the title of a dictionary meant to them Webster's work revised and brought up to date, unrelated to any particular publisher. The testimony of these witnesses, chosen by complainant from among 500,000 or 600,000 as the best exponent of its theory, are so significant that we venture to quote their own words.

(1) *Gash* :

"Q. You bought a Webster's Dictionary because you thought that the rules of spelling

laid down by Noah Webster and the definitions given in his original dictionary were correct, is that true?

"A. Yes.

"Q. And you didn't care who the publisher was as long as it met those qualifications?

"A. As long as it met those other qualifications" (fols. 1102, 1103).

(2) *Catherine* :

"BY MR. HALE :

"Q. When you bought this book did you expect to get a dictionary written by Noah Webster himself? A. Yes, sir.

"Q. How then did you expect to receive an up-to-date dictionary? A. My answer is that I expected to receive Webster's up-to-date dictionary.

"Q. Did you buy upon the reputation of the present standard Webster's dictionaries or upon the reputation of a book more than 40 years old? A. I make the same answer" (fols. 1398, 1399).

(3) *Edith Fisher* :

"Q. Then, don't you mean by the term 'Webster's' Dictionary, which you expect to buy to-day a dictionary based upon the original dictionary written by Noah Webster? A. In a sense it would have to be more than 'based' on it" (fols. 1754, 1755).

She explains that she means by this it must contain more of Webster's work than the word "based" implies (fol. 1757).

(4) *Ida Smack* :

" Q. Does the name ' Webster ' in the title suggest to you the author or the publisher ? A. Why, the author.

" Q. Did you think about the publisher at all when you purchased the book ? A. No, I did not " (fols. 1442, 1444).

And further :

" Q. As between two dictionaries one of which contains little of that man Webster's work and another which contains a great deal of that man Webster's work, which would you consider more closely met your requirements for a real Webster's Dictionary ? A. I would consider that the one that contained a great deal of that man's Webster's work to suit my requirements, as I have occasion to look at the book quite often (fol. 1442).

(5) *Miss Halla Wells* :

" Q. Does not ' Webster's Dictionary ' really mean to you a book originally compiled by Noah Webster and brought up to date ? A. Yes " (fol. 1670).

" Q. Is it connected in your mind with any particular publisher ? A. No.

" Q. You buy the book, then, on the reputation of the original compiler Noah Webster ? A. Yes " (fol. 1671).

(6) *Burlingham* :

" Q. Do you understand anything more by the term ' Webster's Dictionary ' than a dictionary based upon the unabridged dictionary

of the English language of Noah Webster, L.L.D., revised and brought up to date in accordance with the most recent eminent English and American authorities? A. No" (fols. 1269, 1270).

(7) *Lutz* :

" A. I believe that a ' Webster ' dictionary must be connected and based upon Webster's original definitions.

" Q. If you were offered, then, a dictionary containing the same literary matter with its spelling and definitions based upon the original dictionary edited and compiled by Noah Webster, would it matter to you who published it.

" A. If this book was a reliable edition of the Webster Dictionary, which I know to be the best authority, regardless of who published it, it would not matter to me.

" BY MR. HALE:

" Q. You spoke of Webster's original definitions. By that do you mean the definitions contained in the standard current Webster dictionaries now in general use or the definitions contained in some dictionary published more than fifty years ago?

" A. I believe I mean by that I mean the definitions on which all of the genuine Webster books are based" (fols. 1201, 1202, 1203).

(8) *Hughes* :

Speaking of appellee's book, said (fol. 1288):

" Q. Of what book did you suppose it was an abridgement?

" A. Of the original Webster's Dictionary."

And, at fols. 1199, 1200, 1201 and 1202 :

" Q. Does the expression, 'Webster's Dictionary' mean to your mind a dictionary containing the Websterian spelling and Websterian definitions by whatever publisher published ?

" A. I believe that any book called a Webster Dictionary must be connected and based upon Webster's original definitions.

" Q. If you were offered then a dictionary containing the same literary matter with its spelling and definitions based upon the original unabridged dictionary edited and compiled by Noah Webster, would it matter to you who published it? A. If this book was a reliable edition of the Webster Dictionary, which I know to be the best authority, regardless of who published it, it would not matter to me."

(9) *Newberry* :

Referring to the express "Webster's Dictionary," says :

" It is connected in my mind with the original Webster and the one we learned to respect in school."

(10) *Gelhart* :

" Q. Does the name 'Webster's' in a dictionary indicate anything more to you than the contents of that dictionary were originally prepared by some author known as Webster, and are to be considered reliable contents ?

" A. I anticipated that I was buying a dictionary by Noah Webster.

"Q. Have you any reason to believe that you did not get a dictionary by Noah Webster?

"A. I cannot say that I have" (fols. 1408, 1409).

All of the foregoing witnesses negated the suggestion that "Webster's" might imply a publisher. Gash (fols. 1102, 1103), Catherine (fol. 1396), Fisher (fol. 1751), Hughes (fol. 1300), Smack (fol. 1444), Wells (fol. 1671), Burlingham (fols. 1269, 1270).

Absolutely none of the testimony of any of the twenty purchasers of defendant's book amounted to more than this :

They supposed that defendant's dictionary was published by the same concern that published the "Webster's dictionaries they had known, *because they didn't know that other concerns published Noah Webster's work.* Crossman (fols. 813, 814), Fisher (fol. 1738), Hughes (1289), Kronwall (fol. 840), Lutz (fols. 1188, 1189), McMahon (fol. 1223), Pulsifer (fol. 832), Smack (fol. 1420), Wells (fol. 1667), Burlingham (fol. 1254).

This constitutes no evidence of a secondary meaning.

As was said in *Schove vs. Schmincke*, *supra*, p. 91 :

Evidence was given that those words were understood in the trade to refer to plaintiff's goods, and there was also evidence to the contrary. "But several of the plaintiff's witnesses are silent on this subject, and others who have made affidavits do not say more than that they term 'Castle Album' denotes the plaintiff's albums and no others. This may mean that the term denotes the plaintiff's goods to the witnesses

themselves, which is very probable, and may be accepted as true; seeing that they are customers of the plaintiff and have received from him all the 'Castle Albums' they have bought. Thus, in their minds the term would naturally be associated with the plaintiff and goods of his manufacture or selection. But statements to this effect fall far short of the proposition which the plaintiff seeks to establish, viz., that the term is now accepted in the market generally as designating *exclusively* his goods."

(A digest of the testimony of the above twenty-four witnesses will be found at pages 178-187 of the Appendix.)

APPELLEE'S ORDINARY PURCHASERS.

For the appellee to have testimony of a large number of witnesses in the usual way, as to the meaning of the name Webster, would have entailed a very great expense. Therefore appellee caused an absolutely fair canvass to be made of about 1228 persons, chosen at random, in the following cities of the United States: New York, Brooklyn, Boston, Philadelphia, Pittsburgh, Cincinnati, Louisville, Milwaukee, Trenton, Bridgeport, Morristown, Danbury, Jersey City, Meriden, Newark, New Britain, New Brunswick, Waterbury and New London.

In most instances the canvass was made among purchasers of appellee's dictionaries. In order to make it absolutely fair, the persons interrogated were not in-

formed in advance of the purpose of the questions, except that statistics were being taken, and their answers, exactly as given, were taken down by the canvassers.

The following were the questions propounded, and, roughly stated, the answers thereto, stated in percentages :

Question No. 1. Do you know who is the publisher or who are the publishers of Webster's Dictionaries ?

About 94% answered "No."

The balance of 6% named the Merriams, Funk & Wagnalls, Appletons, Lippincotts, Colliers, Syndicate Publishing Company, American Book Company, American News Company, Trow City Directoy, those naming the Merriams being fewer than the aggregate of the others named, and only slightly exceeding those naming Funk & Wagnalls.

Question No. 2. When you hear or see the name "Webster" on a dictionary, does it indicate to you a dictionary gotten out by any particular publisher or at any particular place ?

About 93% answered "No."

About 6% or 7% voluntarily added that anyone could publish the book, or that there were a number of publishers, or words to that effect.

Most of the remaining 7% answered yes, without specifying. A few answered the "Merriams" and "Funk & Wagnalls," "Webster."

Samples of answers were: "Couldn't say. Anyone can make the book." "Springfield," "Boston," "Chicago," "National Press Association," "Despatch" (Pittsburgh newspaper).

Question No. 3. Do you know any city or cities where any Webster's Dictionaries are published?

About 90% answered "No," and the remaining 10% answered "Springfield," "New York," "Chicago," "Hartford," "Philadelphia" and other places.

Question No. 4. Do you know any series of succeeding rewritings of Webster's Dictionaries gotten out by any one publisher?

About 98% answered "No."

Question No. 5. Who do you think wrote the definitions and fixed the spelling of the words to be found in the Webster's Dictionaries you have known of?

A large number of witnesses (about one-third) replied "Don't know," declining to commit themselves, obviously because the question implied a doubt as to whether Webster wrote Webster's dictionary, and they feared they might display ignorance if they gave the obvious answer. Of those who ventured an affirmative reply about 83% answered "Webster" or "Noah Webster."

Samples of the answers of the others are: "As indicated in the books themselves," "Webster with subsequent revisions," "Group or combination of authorities," "Board of college professors," "Contemporaneous authorities," etc.

Question No. 6. When do you think these definitions were written and that spelling fixed?

About 87% of those who ventured an affirmative reply to this question showed by their answers that they regarded Webster's dictionary as an old book.

Upon the foregoing testimony this court is asked to find that the name of the greatest dictionary writer known has now lost all reference to him among dictionary buyers, and is now the *nom de plume* of a publishing house up in Springfield, Mass.

POINT FOUR.

Appellant has not brought its case within the facts of any case in which a secondary meaning was adjudicated.

As illustrating how completely the appellant has failed to bring his case within the facts of any case in which a secondary meaning has been adjudicated, we call attention to the facts of the cases of which Mr. Hale said the following, at page 71 of his brief in support of his motion for a preliminary injunction :

“ The Chatterbox cases decided by this court are directly in point. * * *

“ These cases cannot be distinguished from the case at bar.

“ It would be difficult to find authorities more directly in point.”

We therefore ask the Court's special attention to these cases ; for, if they do not support complainant's contentions, no case does.

The "Chatterbox" cases are :

Estes vs. Leslie, 57 Fed., 22.

Estes vs. Worthington, 31 Fed., 154.

Estes vs. Williams, 21 Fed., 189.

The facts in these cases were as follows :

"Chatterbox" was adopted by complainant's assignor in 1866 as the title of an annual periodical publication embodying juvenile stories by different authors, and attractive pictures. It was an arbitrary fanciful and non-descriptive title identifying solely the qualities personal to the publishers, such as printing, binding, style, etc. Estes' assignor was the original adoptor of the title, except for two negligible spasmodic uses of the name Chatterbox.

Complainant's periodical had a distinct "appearance, style and manner of cover and of printing," which was peculiarly attractive, and universally identified it.

From 1866, when complainant first published its periodical under the title "Chatterbox" until 1876, no one else published any periodical under that title, and from 1876 to 1886, the few who undertook to do so were sued and enjoined. The circulation of complainant's periodical was extensive and it was universally understood that each new number contained stories and pictures wholly different from those published in any previous number, so that there was no question whatever but that the name "Chatterbox" was always wholly disassociated from authorship and wholly associated with the complainant as a selector of stories and pictures, as a printer, binder and dealer.

The literary matter and pictures in complainant's books were not copyrighted, under that name, so no question arose as to "Chatterbox" being the title of matter which might be called by that name at the expiration of a copyright monopoly.

In 1886 the last defendant who was sued began the publication of a similar periodical under the name "Chatterbox" and COPIED "THE GENERAL EXTERNAL APPEARANCE, MANNER OF COVER AND OF DECORATIONS OF THE PLAINTIFF'S BOOKS."

It appears, therefore, that the facts found in the Chatterbox cases and accentuated by the Court as the grounds of its decision not only do not appear in the present case, but the contrary facts clearly appear. Because the Court rested its decision on facts which are negatived in the present case, the necessary implication is that, on the facts of the present case, the Courts which decided the "Chatterbox" cases would speedily dismiss the appellant's present suit.

Our experience in this case confirms the appellant's statement that he is unable to "find authorities more directly in point" than the "Chatterbox" cases.

POINT FIVE.

Proof of deceit of careless, lazy buyers of an article is not evidence of existence of secondary meaning or of fraud.

Any consideration of what evidence the plaintiff has submitted must be considered in connection with the above rule of law.

Buyers of books who are too careless to look at the title page when they buy are not entitled to the court's protection against mistake.

Let us suppose that purchasers exist who have an idea, which is not true, viz., that there is only one publisher of the work of the author they seek, whereas, in fact, there are 53. Would their ignorance warrant the court to present to one of 53 publishers of that author's work a secondary meaning in that author's name and to order the other 52 to hand over all their profits on this book to this one publisher?

The Court will take notice that buyers of dictionaries are reasonably intelligent people, and appellee is not bound to exercise as great care in selling dictionaries as it would be were it selling an article generally consumed by the illiterate portion of the community.

What then is the duty of the defendant in this regard and has it fulfilled this duty?

The appellant has no monopoly of the trade of the careless and indifferent.

In *McLean vs. Fleming*, 96 U. S., 245; 24 L. Ed.,

828, this Court, speaking by Mr. Justice CLIFFORD, said :

"A court of equity will not interfere when ordinary attention by the purchaser of an article would enable him at once to discriminate one from the other."

And in *Columbia Mill Co. vs. Alcorn*, 150 U. S., 460; 14 Sup. Ct., 151; 37 L. Ed., 1144, this Court, speaking by Mr. Justice JACKSON, said :

"Even in case of a valid trade-mark the similarity of brand must be such as to mislead the ordinary observer."

No one is to be excused for not knowing that Webster's work is in the public domain, and that anyone may publish it, or revisions, amplifications and abridgment of it.

The name "Webster's Dictionary" was the title of Noah Webster's first dictionary, the copyright of which expired in 1834, of his second dictionary, the copyright of which expired in 1870 and of his third dictionary, the copyright of which expired in 1889. The copyrights of over 25 other dictionaries, embodying Webster's work with various revisions and all having the name Webster's in the title, have expired. These include all dictionaries copyrighted by the complainant before 1871, that is, all of its real revisions, with the abridgements based thereon, except its revisions of 1890 and 1909.

Since 1834 every person has been charged with the

knowledge that anyone has a right to make and sell a *Webster's Dictionary* and to call it by that title.

This is clearly shown by the Court's rulings in regard to Castoria, which was once patented and on which the patents expired in 1885. It has uniformly been held that everyone thereafter was charged with notice that everyone has a right to make and sell Castoria under that name.

In *Centaur vs. Marshall*, 97 Fed. R., 785, the Court said :

"The name of the appellant's product is 'Castoria,' and the conceded law of this case, upon this preliminary hearing, is that every one has the right to make and sell Castoria under the very name which the appellant uses to describe and advertise its medicine. Every one is presumed to know the law, and, in this state of the case, if the appellees sell their Castoria to those who seek this medicine simply, but who are careless or indifferent whose manufacture they purchase, they may thereby prevent the appellant from making sales and gaining profits which it would otherwise have obtained, but they inflict no remedial injury upon it, and furnish no ground for relief, because they deceive no one, and they violate no duty which they owe to the appellant or to the public, but merely exercise a commercial right which they possess. Every purchaser is charged with knowledge of the fact that any one may make and sell Castoria, and if he seeks that made by one manufacturer rather than that prepared by another, it is his duty to examine the wrapper with such a degree of care

as would ordinarily ascertain who the manufacturer of the article which he purchases is. The law imposes no duty upon the appellees to see to it that the careless and indifferent know that the Castoria which they buy is made by the appellant and not by another. They discharge their full duty to the appellant if they so dress their product that one who seeks to ascertain whose manufacture it is can readily learn, by a reasonable examination of their wrappers, whether it is made by the appellant or by themselves (*Coats v. Thread Co.*, 149 U. S., 564, 567, 572; 13 Sup. Ct., 966; 37 L. Ed., 847)."

This case is singularly like the one at bar, for in both cases the only question involved was the right of defendant to use a certain name.

Applying these rulings of Judge BREWER to the case at bar, we find several very important propositions laid down.

(1) At the expiration of the copyright in 1834 every one was put on notice that the world was free to make and sell Webster's dictionaries. The term "Webster's" had "become known as the name of the thing and as such it could not be appropriated as a trade mark" (*Canal Co. vs. Clark*, 13 Wall., 311; *Chemical Co. vs. Meyer*, 139 U. S., 540, 11 Sup. Ct., 625). "As well might a manufacturer of flour claim a trade mark in the word 'flour' as a manufacturer of Castoria (Webster's dictionaries) as a trade mark in that name" (84 F., 958).

The name "Webster's" is the name by which the article was and is known. For evidence of this see the copyright notices filed by the complainant.

" Within, therefore, the decision in *Singer Mfg. Co. vs. June Mfg. Co.* the word "Castoria" (Webster's) being the generic name by which the article is known to the public it has become the property of the public and anyone is at liberty to use it as descriptive of the thing he is manufacturing and selling" (84 Fed., p. 955).

If any one to-day supposes that there is only one publisher of Webster's dictionaries, it is due to lamentable ignorance of two facts of common knowledge—one, that Webster wrote his book so long ago that by operation of law the right of every one to publish it and call it Webster's has long existed; the other, the fact that numerous other publishers have been publishing it extensively for the last 107 years, especially and most extensively during the lives of the present generation.

The foregoing ignorant and indifferent persons are the only ones whom the court is asked to protect and the only class of persons that is shown by the record to have been deceived.

Appellant's purpose in bringing this suit is to capitalize their ignorance into privilege founded on a Court's decree; then upon the basis of that decree mulct this defendant and other users of the title "Webster's" for thousands of dollars of damages.

The foregoing ignorance and indifference cannot confer any rights upon the appellant, nor impose any liability upon the appellee, for every one is charged with knowledge of the above existing facts.

See *Centaur Co. vs. Marshall*, 38 C. C. A., 413 (97 Fed., 785).

POINT SIX.

Unless the appellee's mere use of the name "Webster's" constitutes unfair competition, there are no facts proved from which deception by defendant could or did result, or from which a fraudulent intent could be inferred.

"The basis of a suit for unfair competition in trade is fraud. To warrant relief in such a suit there must be proof of the fraudulent intent to palm off the goods manufactured by others as those manufactured by the plaintiff or proof of facts and circumstances from which such an intent and fraud may be fairly inferred."

Gorham Mfg. Co. vs. Emery Bird-Thayer Dry Goods Co., 104 Fed., 243.

In the present case there is no direct proof of fraudulent intent on the part of the appellee and indeed the existence of such fraudulent intent is denied in appellee's answer and in express terms by appellee's witnesses (fols. 4316, 4396-7, 4452-3, 4469, 7474-6, 7486-9). Appellee relies upon various facts and circumstances which it sets forth and from which it says that such an intent and fraud may be fairly inferred. These facts and circumstances are:

(1) that appellee, after purchasing the copyright and plates of the Crown Dictionary based on Webster's, published a revised edition of that book under the title "Webster's New Standard Dictionary," (2) that appellee removed the name of Edward T. Roe from its title page, (3) that it omitted the 1904 copyright notice

from the back of the title page, and (4) that it advertised its book in a fraudulent and deceptive way.

Whether or not appellee was justified in publishing and selling a revised edition of the "Crown Dictionary," which was based on Webster's dictionary and whose essential content was Webster's own work, under the title "Webster's New Standard Dictionary" is discussed at length in another part of this brief (Appendix, at pages 196-212). Whether or not the use of the name "Webster" as part of the title of any dictionary not published by appellant is a circumstance from which fraud can be fairly inferred, or from which "remediable injury" can result, has been fully discussed.

Even though appellee's motive was to avail itself of whatever reputation attached to the name of Dr. Webster in connection with dictionaries, this motive was not illegitimate, inasmuch as, and as long as, appellee did not attempt or desire to palm off its dictionaries as those of appellant.

Howe vs. Wyckoff, 198 U. S., 118 at 139.

Dr. Reed's Cushion Shoe Co. vs. Frew, 152 Fed., 890.

It next appears affirmatively that appellee's sole purpose in omitting the name of Edward T. Roe from its title page and the 1904 copyright notice from the back of its title page was to differentiate its book from another book published from a duplicate set of plates by the Cupples & Leon Company (fols. 4322, 4418, 4462). This simple explanation of the omission conclusively rebuts any inference that the omission was

for the purpose of palming off defendant's dictionaries as those published by complainant.

Defendant's Advertisements.

At pages 93-100 of complainant's brief its accusations concerning Defendant's advertisements are summarized.

More than 600,000,000 advertisements of appellee's dictionary were inserted in various newspapers throughout the United States. Appellant has selected from this vast quantity a half dozen for the purpose of proving that appellee was trying to sell his book as and for appellant's book. As a matter of fact they were not defendant's advertisements at all but were the advertisements of the newspapers themselves, chiefly devoted to exploiting the generosity and great public spirit of the newspaper which was distributing a dictionary for the education of the community.

But even if defendant is held fully responsible for these advertisements there is nothing in them which justifies complainant's oft repeated accusations of fraud, unless it was fraud to use the name "Webster."

Turning now to the advertisements which are said to prove defendant's collateral fraud, we find that at page 94 of appellant's brief, it refers to three advertisements, which appeared respectively in the Pittsburgh Post of February 12th, 1911, the Los Angeles Times of December 3d, 1911, and the Mobile Item of December 19, 1911. It is alleged that in these advertisements certain language and a cut of Uncle Sam which had been used in the Boston American of Sep-

tember 12th, 1910, in connection with one of appellant's dictionaries, were copied by appellee. An inspection of the advertisement from the *Mobile Item* will show that the most conspicuous feature on the page is the phrase "A \$4 Dictionary for everybody that reads the Item." Similar language is the important feature of the *Los Angeles Times* advertisement, and, in addition, *this advertisement contains in bold type the statement that "the dictionary is not published by the original publishers of Webster's dictionary or by their successors."*

The feature of Uncle Sam and some of the laudatory reading matter were perhaps copied as good advertisements from some common source or from the *Boston American*, but it is an insult to the commercial intelligence of defendant's advertisers to suppose that the purpose of the foregoing advertisements was to deceive; for no person seeing the Los Angeles, Mobile or Pittsburgh advertisements could possibly be misled unless he had previously seen the advertisement which appeared in Boston *a year earlier*. Would any hard-headed man of business expect that Boston people who had seen the Boston advertisement would be in Los Angeles or in Mobile or in Pittsburgh a year later; would see the advertisement of defendant's book; and, thereupon, buy one of defendant's books believing that he was purchasing one of complainant's books which he had seen advertised the year before in Boston?

If it be illegal to compliment a rival advertiser by copying some sentences of his descriptive advertising, appellant itself is not unsmirched, for in exploiting its "Webster's Condensed Dictionary" in St. Louis in Sep-

tember, 1911 (fols. 6876, 6887, 6905, 6935, 6941), it copied many of the advertisements which had appeared in connection with appellee's book in the *Pittsburgh Post* in February, 1911 (fol. 6865). Indeed, appellee employed for this purpose a man named Murphy, whose chief value consisted in the fact that he had learned all of the secrets of appellee's business when in appellee's employ at Pittsburgh.

On page 95 of appellant's brief is criticized a caution which it is alleged that several of defendant's advertisements contained. The caution "to observe the exact wording," namely "Webster's New Illustrated Dictionary with U. S. Census and Maps" was calculated to produce an effect directly opposite from confusion with the dictionaries of appellant or of any other publisher, and obviously served as an effective warning that there were other Webster dictionaries on the market and that the exact wording "New Illustrated with U. S. Census and Maps" was the identifying symbol of the books which the newspaper was presenting to the public. Moreover, two of these advertisements (see Ex. "Additional advertisements, pp. 4 and 6) included also the regular cautionary notice in the form specified by the Ogilvie decree.

If complainant has by its proof established that all of the laudatory words in the English language such as "authentic," "genuine," "authoritative," "up to date," etc., when used in connection with dictionaries have acquired a secondary meaning and indicate dictionaries published by complainant, there may be some basis for objection to the extracts from ad-

vertisements which appear on pages 96 to 100 of appellant's brief. If, on the other hand, appellant has failed to establish this proposition these advertisements have no vice unless there be vice in the use of the name "Webster's." In detail these advertisements are as follows :

That on page 96 is a reading notice which warns against imitators. As stated above, warning notices of this kind can under no circumstances produce confusion, and it is moreover clear from the testimony that these warning notices were not directed against complainant's publications but against the Webster dictionaries published by Cupples & Leon Company and other competitors (fols. 4462, 4418, 4322). An inspection of the display advertising which accompanied this reading notice, and which appears at page 66 of complainant's exhibit, will show that here again the conspicuous feature was an offer of a "\$4 Dictionary" as a present.

The same comment applies to the quotation from the Seattle Intelligencer on page 97. The display advertising which accompanied this reading notice had as its striking feature the words, "Help yourself to a \$4 Dictionary," and included the regular warning notice of the Ogilvie decree.

On pages 99 and 100 of appellant's brief are various disconnected quotations taken from advertisements used in connection with defendant's dictionary. Most of these quotations are from matter in very small type in inconspicuous parts of the advertisements. In some of these advertisements, also, the conspicuous feature is a

description of the book as "a \$4.00 Dictionary" (complainant's Ex. deft.'s Advs., pp. 70-71), or as the "Post Dictionary," etc. (complainant's Ex. deft.'s advs., pp. 44, 97, 103). At least one of them moreover contains the explanatory notice of the Ogilvie decree (complainant's Ex. deft.'s advs., p. 57). Several of the quotations are misleading because of the omission of explanatory matter (Ex. deft.'s advs., pp. 44, 71).

It further appears that several of the advertisements from which quotations are taken were entirely prepared by the newspapers and absolutely upon their own responsibility (see complainant's Ex. deft.'s advs., pp. 103, 112, also fols. 2504-7, 6876, 7054 and 7072).

At page 98 the language from defendant's wrapper again raises merely the question of the right to use the name "Webster." Unless "Webster" means "Merriam" this wrapper is unobjectionable. Furthermore this wrapper would naturally come into the possession of the purchaser only after the sale was completed and could not in any way influence the purchaser to buy appellee's dictionary believing that it was one of appellant's dictionaries.

This is the entire evidence upon which appellant attempts to base its charges of collateral misrepresentations, alleged to have resulted in the sale of appellee's books as and for those of appellant. It is submitted that there has been neither misrepresentation, nor any act calculated to produce confusion or "passing off".

POINT SEVEN.

No accounting should be ordered in the present case.

If no injunction be ordered the Court will of course refuse to direct an accounting. If an injunction in any form be decreed it would nevertheless be inequitable to order that appellee account and pay over its profits to appellant. Where, in a suit for unfair competition, an injunction gives the appellant all the relief to which he is entitled, no accounting for profits should be ordered.

“Courts will refrain from ordering an account of profits where an injunction will satisfy the substantial equities of the case.”

J. F. Rowley Co. vs. Rowley, 193 Fed., 390, at p. 393.

“A decree for profits and damages does not necessarily follow a decree for injunction.”

Rushmore vs. Badger Brass Mfg. Co., 198 Fed., 379, at p. 381.

The decision in *Merriam vs. Saalfeld*, 198 Fed., 369, holds no more than that a defendant must account for profits resulting from the violation of an injunction which by privity of contract is binding on said defendant.

The rule laid down in *Westinghouse Co. vs. Wagner Elec. Co.*, 225 U. S., 604, applies to accountings in patent cases. Such accountings necessarily rest upon the assumption that defendant has appropriated a property right of the complainant, and that he should pay

over to complainant whatever profits accrued to him by reason of his use of that property right. In a true sense no property rights are appropriated by unfair competition, and the extent of relief granted in such a case should depend entirely upon the general equities as disclosed by the evidence.

McLean vs. Fleming, 96 U. S., 245.

*Complainant Has Forfeited All Rights to an Accounting
by its Own Laches.*

In March, 1909, a few months after appellee began the sale of its dictionary, appellant wrote to appellee asking for a copy of its "Webster's New Standard Dictionary." Appellee immediately sent two copies of its dictionary to appellant with its compliments. A short but pleasant correspondence ensued. The last letter in this correspondence was one from appellant to appellee and ended with the words:

"We shall doubtless have occasion to write to you again about your book but we shall ask nothing but what is proper and reasonable under the Court decisions and you will of course expect to grant no less."

This letter was dated April 2d, 1909. During the remainder of the year 1909 and during the year 1910 and the greater part of 1911 no further communication of any kind was received from the complainant. It was not until October 4th, 1911, two and a half years after appellant's last letter, that appellant again wrote

to appellee about its book. At that time appellee immediately granted the most extreme concession ever ordered "under the court decisions." But appellant was not satisfied and brought this suit.

Inasmuch as every one of appellee's dictionaries and all of the advertisements of the newspapers since October 9, 1911, have contained the cautionary notice, "This dictionary is not published by the original publishers of Webster's Dictionary or by their successors," the only period which could possibly be included in a decree for an accounting would be the period prior to October 9th, 1911, *i. e.*, prior to the date when these cautionary notices were inserted. By its own silence during this period complainant is barred from asking any accounting. Indeed appellant's apparent acquiescence after the correspondence of March, 1909,—appellant's silence after giving appellee reason to believe that it would write again if it had any actual or fancied complaint,—and appellant's present demand that appellee pay over its entire profits realized during that period of silence strongly raise the inference of designedly sharp practice.

It would be grossly inequitable to order this appellee to account for all of its profits amounting to from \$50,000 to \$100,000 inasmuch as the vast majority if not all of appellee's sales were made upon the merits of appellee's own books and as a result of appellee's business enterprise absolutely without any reference to appellant's publications.

See *Sebastian on Trade-Marks*, 5th edition, p. 249.

In appellant's brief below at page 89 it is stated that "almost certainly 99% of the purchasers of" appellee's "dictionaries have bought them under a misapprehension of what they were buying."

From the following facts it appears that this statement is absolutely unfounded, and that if there was any confusion at all between appellee's and appellant's books, this confusion was, broadly speaking, a negligible factor in the winning of profits.

(1) In August, 1911 (fol. 7376), the Springfield Union of Springfield, Mass., began a circulation campaign in connection with which it used the "Webster's New Standard Dictionary" of appellee. This campaign continued until November 11, 1911 (fol. 7428). During the course of the campaign more than 12,000 dictionaries were distributed by the Springfield Union (fol. 7498). It should be noted that this campaign was carried on at Springfield Mass., the home of the Merriams from the beginning of their business career.

There is probably no other City in the United States where the history of appellant's publications, of its claims and pretensions are so well known and where appellee's books would have been so quickly rejected if appellant's contentions as to the public's preference for its publications were correct.

On October 21st, 1911, however, in the midst of this campaign the Springfield Union published conspicuously in its dictionary advertisements the following notice :

" Any of our readers who gained the impression from the Union's announcements

that Webster's New Standard Dictionary, Illustrated, was published by G. & C. Merriam Co. and purchased it for that reason, may return the book and we will most gladly refund expense bonus amount. Furthermore, any person who obtained the dictionary at the Union office and feels they did not get full value may have money back by returning book in good condition " (fol. 7420).

Up to June 28, 1912, eight months later, not a single person of all the 12,000 who had purchased these dictionaries took advantage of this offer and returned the book (fol. 7423). Moreover, beginning on October 21st, 1911, when the above notice was published, and continuing until the end of the campaign on November 11th, 1911, the Springfield Union included in all of its advertisements the cautionary notice. During this period, of twenty-one days, approximately 2,650 dictionaries were sold (fol. 7427). It is, therefore, obvious that the public of Springfield, Mass., purchased appellee's books on their own merits without reference to the appellant.

As Mr. Nolan, the circulation manager of the Springfield Union, testified: "The persons who bought the dictionary seem to be perfectly satisfied, and it is now nearly one year since the first dictionary was sold" in Springfield, "and we think that in all that time, in this community, if the dictionary was not what it was represented to be, we would have heard of it long and loud, before this" (fol. 7558).

(2) As further indicating the indifference of the



Truth About What Is Called "Webster's New Standard Dictionary, Illustrated"

There is a book being sold by another St. Louis newspaper, known as Webster's New Standard Dictionary, Illustrated.

This work has absolutely no connection with the genuine Webster's family.

It was imported into the United States from England some years ago (about 1904) by a Dr. Klopsch, editor of a New York weekly.

It was then and there known as the Crown Dictionary. Dr. Klopsch, after using it as a premium on his paper, sold the right to revise and reprint it in this country to several publishing concerns.

It never knew the name of Webster until 1908, when the publishers of the book now offered in St. Louis, realizing that the public had come to know "Webster's," as a mark of the highest merit in dictionaries (having been used for 67 years by the G. & C. Merriam Co.), adopted that familiar name for the market value it would give their books.

But note that this dictionary doesn't bear the circle trade-mark of the G. & C. Merriam Co. That would invite prosecution. The Merriam Co. now have a suit pending in court by which they aim to restrain other publishers from using the name "Webster's," holding it as a part of their trade-mark. If the suit is decided in their favor, the old English dictionary masquerading as Webster's will have to be given a new name.

A copy of the Crown Dictionary above mentioned can be found at the Dictionary Department of The Re-

public and compared with "Webster's New Standard Dictionary, Illustrated," by anyone desiring to substantiate these statements.

This also said alien orphan, the plates for which long ago became worn and obsolete, having no expense for editing and no editor, not even having its pages numbered, can be produced very cheaply and sold to newspapers that are willing to foist it on an unsuspecting public in as a Webster's Dictionary, at a profit to themselves.

Sold in St. Louis for 98 cents, newspaper advertisements are on file in The Republic office showing that as late as June, 1911, this same book was offered by a certain New York paper for 89 cents. The extra charge of 9 cents is the odd way adopted by its present newspaper sponsor to show its appreciation of the loyalty of its readers.

"Webster's Condensed Dictionary, Twentieth Century Edition," the G. & C. Merriam publication, has never been offered by any newspaper at less than 89 cents and cannot be purchased at any store, the entire edition being reserved for newspaper distribution.

The Republic welcomes legitimate competition. It claims no monopoly in its great educational offer of dictionaries, although first in the field. It only desires that those who want to accept this offer shall know the facts, and that that those who desire to secure genuine Webster's Dictionaries shall not be misled by clever misrepresentation into accepting a cheap imitation.

HERE IS WHAT YOU WANT TO KNOW

THE WAY THE TWO DICTIONARIES "STACK UP"

The Genuine Webster's

The So-Called

The Genuine Webster's

The So-Called

AUTHENTICITY.

Published by the G. & C. Merriam Company, publishers of genuine Webster's Dictionaries.

Published from the old Crown Dictionary, which was brought to this country, and lain in dust for many years.

INDORSEMENT.

Genuine Webster's Dictionaries are indorsed by the highest educational circles in the United States, by the Supreme Court, the Supreme Court of Appeals, the leading educational service and leading educators throughout the country.

Offers indorsement of no court, leading school, college, university or educator.

ADOPTION BY SCHOOLS.

Adopted by 10 per cent of the best schools in the United States.

No adoption.

NUMBER WORDS DEFINED.

43,331, including the latest words made up to the present time.

No claim made. Probably not 20,000.

HOW DEFINED.

Full and complete definitions. Only actual competitors can afford to do this. Webster's Twentieth-Century is the result.

Scanty and incomplete definitions.

NUMBER OF PAGES.

518 pages, exclusive of maps, charts and numerous full-page illustrations.

Pages not numbered. No index to define as many words and define them as Webster's Twentieth-Century would require. Only 180 pages.

DERIVATIONS.

Full etymologies a feature of the dictionary, and of great value to students and children.

No etymologies.

ILLUSTRATIONS.

1500 text illustrations, supplied by the Government, and colored maps and charts and 1000 pictures.

No text illustrations.

COMPILED BY.

Compiled by the leading lexicographers in the United States, and by the mind of Noah Webster, whose high scholarship and scholarly work have made his name a household word in the present day.

Identify not revealed. Secret remains locked in the brains of the publishers.

CENSUS MATTER.

Figures taken from latest census, and published by the Government, and by the leading lexicographers in the United States, and by the mind of Noah Webster, whose high scholarship and scholarly work have made his name a household word in the present day.

Identify not revealed. Secret remains locked in the brains of the publishers.

UP-TO-DATE-NESS.

Originally compiled in 1854, and completely revised in 1908, and 1909, and 1910, and 1911, and 1912, and 1913, and 1914, and 1915, and 1916, and 1917, and 1918, and 1919, and 1920, and 1921, and 1922, and 1923, and 1924, and 1925, and 1926, and 1927, and 1928, and 1929, and 1930, and 1931, and 1932, and 1933, and 1934, and 1935, and 1936, and 1937, and 1938, and 1939, and 1940, and 1941, and 1942, and 1943, and 1944, and 1945, and 1946, and 1947, and 1948, and 1949, and 1950, and 1951, and 1952, and 1953, and 1954, and 1955, and 1956, and 1957, and 1958, and 1959, and 1960, and 1961, and 1962, and 1963, and 1964, and 1965, and 1966, and 1967, and 1968, and 1969, and 1970, and 1971, and 1972, and 1973, and 1974, and 1975, and 1976, and 1977, and 1978, and 1979, and 1980, and 1981, and 1982, and 1983, and 1984, and 1985, and 1986, and 1987, and 1988, and 1989, and 1990, and 1991, and 1992, and 1993, and 1994, and 1995, and 1996, and 1997, and 1998, and 1999, and 2000, and 2001, and 2002, and 2003, and 2004, and 2005, and 2006, and 2007, and 2008, and 2009, and 2010, and 2011, and 2012, and 2013, and 2014, and 2015, and 2016, and 2017, and 2018, and 2019, and 2020, and 2021, and 2022, and 2023, and 2024, and 2025, and 2026, and 2027, and 2028, and 2029, and 2030, and 2031, and 2032, and 2033, and 2034, and 2035, and 2036, and 2037, and 2038, and 2039, and 2040, and 2041, and 2042, and 2043, and 2044, and 2045, and 2046, and 2047, and 2048, and 2049, and 2050, and 2051, and 2052, and 2053, and 2054, and 2055, and 2056, and 2057, and 2058, and 2059, and 2060, and 2061, and 2062, and 2063, and 2064, and 2065, and 2066, and 2067, and 2068, and 2069, and 2070, and 2071, and 2072, and 2073, and 2074, and 2075, and 2076, and 2077, and 2078, and 2079, and 2080, and 2081, and 2082, and 2083, and 2084, and 2085, and 2086, and 2087, and 2088, and 2089, and 2090, and 2091, and 2092, and 2093, and 2094, and 2095, and 2096, and 2097, and 2098, and 2099, and 2100, and 2101, and 2102, and 2103, and 2104, and 2105, and 2106, and 2107, and 2108, and 2109, and 2110, and 2111, and 2112, and 2113, and 2114, and 2115, and 2116, and 2117, and 2118, and 2119, and 2120, and 2121, and 2122, and 2123, and 2124, and 2125, and 2126, and 2127, and 2128, and 2129, and 2130, and 2131, and 2132, and 2133, and 2134, and 2135, and 2136, and 2137, and 2138, and 2139, and 2140, and 2141, and 2142, and 2143, and 2144, and 2145, and 2146, and 2147, and 2148, and 2149, and 2150, and 2151, and 2152, and 2153, and 2154, and 2155, and 2156, and 2157, and 2158, and 2159, and 2160, and 2161, and 2162, and 2163, and 2164, and 2165, and 2166, and 2167, and 2168, and 2169, and 2170, and 2171, and 2172, and 2173, and 2174, and 2175, and 2176, and 2177, and 2178, and 2179, and 2180, and 2181, and 2182, and 2183, and 2184, and 2185, and 2186, and 2187, and 2188, and 2189, and 2190, and 2191, and 2192, and 2193, and 2194, and 2195, and 2196, and 2197, and 2198, and 2199, and 2200, and 2201, and 2202, 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general public to the claims of the G. & C. Merriam Co. we give the following facts concerning the campaign which was carried on in St. Louis, Missouri, during September, October and November, 1911. In this campaign the St. Louis Republic advertised the "Webster's Condensed Dictionary, Twentieth Century Edition" of the appellant and the St. Louis Post Dispatch advertised the "Webster's New Standard Dictionary" of appellee. By means of the usual full page advertisements each newspaper attempted to explain the merits of the book which it was distributing, and the St. Louis Republic took particular pains to lay before the good citizens of St. Louis numerous false and misleading statements concerning appellee's dictionary. An example of these advertisements by which complainant attempted to stamp out the competition of defendant is given on the opposite page. The attention of the court is especially directed to the following language in the sixth paragraph of the left-hand column of that advertisement :

"The Merriam Co. now have a suit pending in court by which they aim to restrain other publishers from using the name "Webster's," holding it as a part of their trade-mark."

Appellant probably misinformed the population of St. Louis by means of its full page *Republic* advertisements as completely as any community in the United States has been misinformed. In spite of that fact appellee sold 30,000 of its dictionaries in St. Louis (fol. 6945). In comparison with appellee's honest,

modern and up to date dictionary, with clear type and attractive illustrations, appellant's antiquated "Condensed Dictionary" (its so-called "Twentieth Century Edition") with tiny diamond-pica type, confusing method of grouping words according to their etymological roots, archaic illustrations and uninteresting vocabulary was a complete failure. The *Republic* terminated its campaign with appellant's dictionary several weeks before the first campaign with appellee's books ended (fol. 6952) and the demand for appellee's books was so great that after the first closing the *Post Dispatch* was compelled to have a second short campaign which continued until after Christmas (fol. 6954).

Thus, in spite of all denunciation, calumny and "revelation," which appeared in the advertisements of appellant's books, the dictionaries of appellee won on their own merits.

(3) At least once in each of appellee's campaigns at or before the filing of the bill of complaint herein appellee published the cautionary notice in the extraordinarily conspicuous form which appears in the advertisement on the opposite page, from the *Baltimore American*, of October 31st, 1911 (fols. 7005-8). On pages 1743 to 1751 of the record, the record of sales in all of the more important newspaper campaigns which were being carried on at that time is given. It appears conclusively from this record that the public bought appellee's books entirely upon their own merits and not at all relying upon the alleged merits of appellant's books, for the sales were not affected in any way by the



TELL YOUR FRIENDS

EVERYBODY MAY HAVE THIS

**LIMP
LEATHER**

1200 Pages

\$4.00

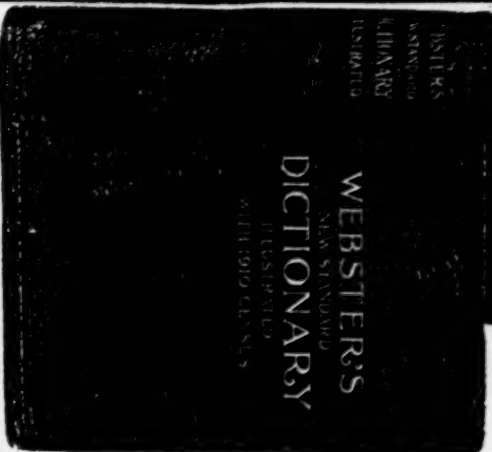
Dictionary

BY CLIPPING

One Coupon

AS EXPLAINED BELOW

This Beautiful Book



Cheap at \$5.00

Illustration of \$4.00 crane, currently reserved in stock

DON'T DELAY! The time is limited now to **only FIVE DAYS**, and these days will be busy ones. **Come Early!**

Present One Coupon and Get Your Book

at the Main Office of The Baltimore American or from
any of the Following Distributing Stations:

North, Middlemore,
1512 N. Charles St.
1740 Greenmount Ave.
Northwest Middlemore,
North Ave. and Fifth St.
1115 Pennsylvania Ave.
McKinnon and Laramie
Shelburne Ave. and 800
4th St.

South Middlemore,
30 E. Port Ave.
3425 Legat St.
Southwest Middlemore,
629 N. Fremont Ave.
2100 Providence Ave.
West Middlemore,
1400 North Ave.
Northwest Middlemore,
1200 Greenmount Ave.
4612 Hurford Ave.
646 N. Chester St.

East Baltimore:
1536 Orleans St.
2600 E. Fayette St.
Southwest Baltimore:
R. W. Center Plot N
and Patterson Park
Ave.
2300 Hudson St.
5426 Emdin Ave.
Brooklyn and Bush St.



Distribution Positively

ENDS NOV. 4th

CLUB and present the above Coupon, together with an express note, amount of \$500, for the Christmas Long Lumber, 84 Volume, \$100 for the 85 Volume, or for the 86 Volume, to delay the express terms of the delivery.

ANY ROOM WE MAIL THE EXTRA FOR POSTAGE.

(Reduced from 14½ x 8½ to 9 x 5½ inches.)

insertion of these cautionary notices, even in the most conspicuous form.

The reading notices and enormous display advertisements which appeared in the leading newspapers of 400 cities created a demand in each one of those cities for appellee's *particular* books, brought into being a valuable good-will which had not previously existed, and produced large profits for appellee. This good-will attached to appellee's books alone—it was a new thing, separate and distinct from the good-will of appellant or any other publisher of dictionaries. Appellee is entitled to keep the profits which were made in this new market built up by its own enterprise.

Conclusion.

This Court should put an end for all time to appellant's persistent campaign of twenty years to monopolize the Webster dictionary business. That can be accomplished only by an emphatic declaration by this Court that "Webster's" has *no* "secondary meaning" indicating dictionaries published by appellant, and that appellant does *not* own exclusive or semi-exclusive rights in that name which entitle it to forbid or regulate its use by its numerous competitors engaged in publishing revisions, amplifications and abridgments of the work of Noah Webster.

So long as appellant is left with a colorable excuse for making those claims it will continue to frighten its competitors from the field by the oppressive methods

employed by it against this appellee, for, though this appellee, to save the expense of a lawsuit, conceded what appellant had no right to claim, namely, it inserted, on its title pages a cautionary notice which necessarily suggested a sort of admission of inferiority, and it inserted a similar notice in its advertisements at the added advertising expense of thousands of dollars, nevertheless, because it would not give up the name "Webster's," it has had to expend tens of thousands of dollars to defend this suit.

With publishers less able to bear the burden of that expense the cost of defending their rights would be prohibitory.

Therefore, full justice will never be done until this Court emphatically declares that "Webster's" is a public name in which this appellant has no rights superior to those of the public ; and that everyone may use that name in the titles of dictionaries based upon Webster's work with the same freedom with which appellant uses it, that is, without the restrictions of cautionary notices.

With such an opinion the decree appealed from should be affirmed.

Respectfully submitted,
HUGH A. BAYNE,
Counsel for Defendant-Appellee.

Office Supreme Court, U.
FILED
MAR 13 1915
JAMES D. MAHER
CLERK

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Supreme Court of the United States,

OCTOBER TERM, 1914—No. 217

G. & C. MERRIAM COMPANY,
Complainant-Appellant,
vs.

SYNDICATE PUBLISHING COMPANY,
Defendant-Appellee.

Brief on Behalf of Defendant-Appellee.

Vol. II.

Being an Appendix of Facts.

HUGH A. BAYNE,
Counsel for Defendant-Appellee.



APPENDIX.

Full Statement of the Facts.

The facts may be divided approximately into three periods, viz., the period before complainant entered the field, from 1806 till 1847; the period from its entry into the field in 1847 till 1889; and the period from 1889 to date. This division will incidentally serve to direct attention to two radical errors of fact, upon which complainant has heretofore relied, viz., (a) that it was the *original* publisher of Webster's dictionary; and (b) that it was the *exclusive* publisher thereof from 1847 till 1889.

1806-1847.

From 1806 until 1847 complainant published no Webster Dictionaries at all; but, on the other hand, dictionaries were published under that title, during that period, by numerous other publishers.

The publishers of Webster Dictionaries during the first forty-one years (1806 until 1847) of the publication of that author's dictionary were: (1) Hudson & Goodwin, of Hartford; (2) J. & D. West, of Boston; (3) S. Converse, of New York; (4) N. & J. White, of New York; (5) White, Gallagher & White; (6) F. J. Huntington, of New York; (7) Huntington & Co., of New York; (8) Huntington & Savage, of New York, and (9) J. S. & C. Adams, of Amherst, Mass.

Complainant was not a publisher of the dictionary during that period.

That the circulation of the Webster's dictionaries of the foregoing publishers was extensive, before 1847, appears, from complainant's statement, in the preface of its 1847 edition, that Noah Webster's books had, prior to that time, been "read by millions."

I.

1806 to 1840.

Publishers: HUDSON & GOODWIN, Hartford.

INCREASE COOKE & Co., New Haven (1806).

Title: *Webster's Dictionary*.

Copyright: 1806 (See title page in record, p. 671).

We infer that the above publishers continued to publish the above book until Noah Webster began the publication thereof in 1840 (See preface to Webster's International Dictionary).

II.

1807.

Publishers: J. & D. WEST, Boston.

Webster's Common School Dictionary (Record, p. 1787, fol. 7143).

III.

1828 to 1840 or later.

Publishers: S. CONVERSE, New York, 1828.

Title: *Webster's Dictionary*.

Copyright: 1828 (See title page in Record, p. 672).

This was an unabridged edition in two volumes quarto, and was the only large Webster Dictionary until 1840. (See preface to Webster's International Dictionary).

This book was the great work whose appearance complainant sets down as one of the great events in the history of the world (See Webster's International Dictionary, at page 2055 thereof).

IV.

1828 to 1856.

Publishers: N. & J. WHITE, New York, 1833.

Title: On back: *Webster's Dictionary*.

On title page: "Abridged * * * for the use of Primary Schools and the Counting House."

Copyright: 1828 (*Ib.*, p. 674).

This abridged dictionary passed through thirteen editions

(fol. 2694) and was sold or for sale, according to the title page in New York, Albany, Boston, Philadelphia, Baltimore, Hartford, Buffalo, Pittsburg, and Columbus, Ohio (fol. 2695) (*Ib.*, p. 674). We infer that the Whites published this book, and, the book referred to below in V., during the copyright period, because there is no evidence that anyone else ever published these books, or that their right to publish them was ever terminated.

The title page in evidence bears the imprint " 1838 " (fol. 2692).

V.

1829 to 1857.

Publisher : N. & J. WHITE, New York, 1838.

Title on Back : *Webster's Dictionary*.

On title page : " * * * Abridged from the Quarto edition of the Author * * * ."

Copyright : 1829.

This abridged dictionary passed through fifteen editions (*Ib.*, p. 673).

VI.

1830 to 1831 and later.

Publishers : WHITE, GALLAGHER & WHITE.

Webster's Primary School and Counting House Dictionary (Record, fols. 7136, 7137).

VII.

1833 to 1854.

Publisher : F. J. HUNTINGTON, New York, 1839.

Title on back : *Webster's Dictionary*.

On title page : " A Dictionary for Primary Schools."

Copyright : 1833.

In VIII. below reference is made to the evidence which shows that the publication of this dictionary was continued until 1854.

Ib., p. 675, and fols. 3240, 7130.

VIII.

1837-1854.

Publishers : HUNTINGTON & Co. ; F. J. HUNTINGTON ; HUNTINGTON & SAVAGE.

Titles : *Webster's Academic Dictionary* ; *Webster's High School Dictionary* ; *Webster's University Dictionary* ; *Webster's Pocket Dictionary*.

These dictionaries were published by F. J. Huntington or F. J. Huntington & Co. or Huntington & Savage, from 1837 (fols. 3203, 3215) until 1854 (3215), that is, 17 years, under contracts with Noah Webster and with the Webster heirs obligating the publishers to "keep the market well supplied with said works" (fol. 3193). They also appeared to have enjoyed, during this period of 17 years, a monopoly of the business of publishing abridged Webster Dictionaries of the same sizes as those they publish (fols. 3139, 3213).

Also see Record, pages 675, 797-799, 801-804, 805-807, especially folios 3186, 3189, 3193, 3203, 3207, 3208, 3221, 3222.

1839-1853 and later.

Publishers : WHITE & SHEFFIELD.

Title : *Webster's Primary Dictionary* (fol. 7132).

IX.

1840 to 1853.

Publishers : J. S. & C. ADAMS, Amherst, Mass., 1844.

Title on back : *Webster's Dictionary*.

On title page : " * * * First edition in Octavo, containing the whole edition of the Quarto, with corrections * * *."

Copyright 1840.

The title page refers to a prior Quarto edition (fols. 2701-2).

This book was in two volumes, was sold or on sale, according to the title page, in Amherst, Boston, New York, Philadelphia and Hartford (*Ib.*, p. 676).

Although the preface of the Webster's International Dictionary states that the copyright of the 1840 Webster was purchased by the Merriams in 1843, the imprint of this book,

"1844", shows that the prior rights of others to publish abridgments of the 1840 book were not affected by the contract of 1843, but continued after that date. As the right to publish abridgments was not conveyed by the Webster heirs till 1853 (Record, page 783 *et seq.*), we may properly infer that Adams continued to publish this abridgment until 1853.

1847-1889.

Webster Died in 1843.

In 1847 complainant first began to publish Webster's dictionaries. At that time Webster's fame as a lexicographer already had become national and international.

In the preface of its edition in 1847 (final par.), complainant said :

" * the name Noah Webster, from the wide circulation of some of his works, is known familiarly to a greater number of inhabitants of the United States than the name, probably, of any other individual except the *Father of His Country*."

Already, in 1847, Webster's fame attached especially to his clear definitions of the standard words of the language. Again we quote complainant's words from the preface of its 1847 edition :

"The chief value of a dictionary consists in its *definitions* :—in giving a clear, full and accurate exhibition of all the various shades of meaning which belong, by established usage, to the words of a language. It is in this respect, especially, that Dr. Webster's Dictionary has been generally considered superior to every other, both of this country and of England."

Complainant elsewhere speaks of "those definitions of standard words which are Dr. Webster's especial merit."

(Webster's International Dictionary Publisher's Statement.)

The greater was the fame of Webster and of his works the less likely was it that the name "Webster's" could depart completely from his personality and become associated in the public mind exclusively with one commercial house, as its commercial trade symbol.

Even had Webster or his heirs undertaken to do so, they could not have conferred upon the complainant any property right in the name "Webster's." As Judge WALLACE said in *Black vs. Erich*, 44 Fed., at page 794 :

"Neither the author nor proprietor of a literary work has any property in its name. It is a term of description which serves to identify the work * * *."

But no attempt was ever made to confer upon the complainant any exclusive rights in the name "Webster's" as the title of a dictionary. The copyright of the 1806 edition entitled "Webster's" had already expired in 1834 (fol. 7116), and the copyrights of every succeeding book entitled "Webster's," the publication whereof began before 1870, are in the public domain.

Complainant did not enter the business as the "successor" of the original purchasers of Webster's Dictionary, who were Hudson & Goodwin and Increase, Cooke & Co., as to the 1806 book, and S. Converse & Co., as to the 1828 book. It was merely one of many firms licensed to print and sell the copyrighted matter in the 1828 edition. The same license had already been conferred upon nine publishers and was then and thereafter continuously exercised by at least six of that number as well as by seven others who entered the field later.

Complainant shared the right to entitle its books "Webster's" in common with the following sixteen publishers who published Webster's work during the entire period from 1847 till 1889 (see *supra*).

- (1) 1828-1856, N. & J. White.
- (2) 1837-1854, Huntington & Company.
- (3) 1837-1854, F. J. Huntington.
- (4) 1837-1854, Huntington & Savage.
- (5) 1839-1853, or later, White & Sheffield.
- (6) 1840-1853, or later, J. S. & C. Adams.

(7) 1841-1853, or later, Harper & Brothers.

(The last three publishers published four different Webster's dictionaries.)

(8) 1856, 1857, and later, Mason Brothers.

(This firm published six different Webster's dictionaries.)

(9) 1856-1876, and later, J. B. Lippincott & Company.

(This firm published five different Webster's dictionaries.)

(10) 1857-1892, American Book Company.

(11) 1867-1892, Ivison, Phinney, Blakeman & Co.

(12) 1867-1892, Ivison, Blakeman & Taylor.

(The Webster's Dictionaries published by this firm and by American Book Company—7 in number—were those sold in the schools.)

(13) 1872, and later, J. Duffy's Sons & Company.

(14) 1879-1912, Hurst & Company.

(15) 1880-1889, World Publishing Company.

(16) 1885-1890, Ward, Locke & Company.

(This publisher's Webster's dictionaries were in various sizes from crown Octavo to pocket editions) (fols. 4773, 4794-4796).

The above statement is based mainly on evidence which has been in the possession of the complainant for years.

Yet despite this fact the Merriams have allowed Judge COLT to hold:

"It further appears from the evidence that from 1847 to 1889 the Merriams were the sole publishers of Webster's Dictionaries, and that in 1889, the name had acquired a secondary meaning, and indicated to the public the dictionaries published and sold by the Merriam Company" (Ogilvie vs. Merriam, 149 F., 856-60).

This mistaken finding of Judge COLT the Merriams now seek to turn into a *grant* to them of a property right worth a vast sum, and into a weapon with which they seek to penalize for their benefit this defendant and some 50 others who now publish this dictionary, by suits for damages for trespass upon property of theirs which it now seems they do not possess.

The testimony showing that the foregoing were the publishers selling this book between 1847 and 1889 is as follows:

I.

1841-1853 and later.

Publishers: HARPER & BROTHERS, New York.

Title: *Webster's Dictionary*.

A copy of this book bearing the imprint "1846" is in evidence and the preface shows that its publication began in 1841 (See also Record, page 1784, fol. 7134).

A new contract by Harper Bros. with the Webster Executors, regarding this book, was made in 1847, and is referred to in the Merriam contract of 1853 with the Webster executors as an existing right, under which Harper was then publishing the book (page 786, par. 6, fols. 3142, 3143).

The Merriam contract of 1853 recognized the Harpers' rights and promised not to trespass on them by publishing a Webster dictionary of the same size (fol. 3159). No other publisher except the Harpers' is shown to have ever published this edition; so that presumably they continued to publish during the copyrighted period, or until 1889. The Harper rights were never assigned. The Harper publication surely continued for at least six years and probably during the entire period that Judge COLT found that the Merriams were the "sole publishers" of Webster's Dictionaries.

II.

1839-1853 and later.

Publishers: WHITE & SHEFFIELD.

Titles: *Webster's Octavo Dictionary*.

Webster's Primary Dictionary.

In 1839 they were publishing a Webster's abridged from the quarto (Record, fol. 7132), which evidently is the above octavo which the testimony shows they were still publishing in 1847 and in 1853 (fol. 3142). In the contract of 1853 between the Merriams and Webster executors, the executors' prior contract with White & Sheffield was referred to as still in operation. The White & Sheffield rights were never assigned.

The White & Sheffield publication continued for at least seven years and probably during the entire period that Judge COLT found that the Merriams were the sole publishers of Webster's Dictionaries.

III.

1840-1853.

Publisher : J. S. & C. ADAMS, Amherst, Mass., 1844.

Title : *Webster's Dictionary*.

This book was in two volumes, was sold or on sale, according to the title page, in Amherst, Boston, New York, Philadelphia and Hartford (*Ib.*, p. 676).

Although the preface of the Webster International Dictionary states that the copyright of the 1840 Webster was published by the Merriams in 1843, the imprint of this book, "1844", shows that the prior rights of others to publish abridgments of the 1840 book were not affected by the contract of 1843, but continued after that date. As the right to publish abridgments was not conveyed by the Webster heirs till 1853 (Record, page 783 *et seq.*), we may properly infer that Adams continued to publish this abridgment until 1853.

The period of this publication continued for six years after complainant began to publish a Webster dictionary in 1847.

IV., V., & VI.

1837-1854.

Publishers : HUNTINGTON & Co., F. H. HUNTINGTON, HUNTINGTON & SAVAGE. (See above.)

Titles : *Webster's Academic Dictionary*.

Webster's High School Dictionary.

Webster's University Dictionary.

Webster's Pocket Dictionary.

Extensively published by these publishers (one publication going thro 15 and one thro 13 editions), and sold continually during 17 years, as shown above (fols. 3203, 3215, 3193, 3189, 3212).

The period of these Huntington publications continued for seven years after the complainant began to publish a Webster dictionary in 1847.

VII.

1856-1857 and later.

Publishers : MASON BROTHERS, New York, 1856.

Titles : *Webster's Academic Dictionary* (Revised Edition).

Copyright : 1856, by George & Charles Merriam.

Also,

Title : *Webster's School Dictionary*.

Copyright : 1856, by G. & C. Merriam.

And

Webster's High School Dictionary.

Copyright : 1856, by G. & C. Merriam.

These three publications are especially significant because they show that the complainant, although it controlled the situation as proprietor of the copyrights, expressly permitted Mason Brothers to use the title " Webster's " in the title of the Dictionary, and to assert, in so many words, " Published by Mason Brothers," with no reference of any kind to the complainant (Record, page 678).

How many years Mason Brothers continued to sell these dictionaries does not appear, but as they were in the dictionary business in 1857 (fol. 7146) the sales probably continued long after that.

VIII.

1856-1876 or later.

Publisher : J. B. LIPPINCOTT & COMPANY, Philadelphia, 1876 (fol. 2440).

Titles : *Webster's Royal Octavo Dictionary*. *Webster's New University Dictionary*.

Webster's Pronouncing Dictionary, 1856 (Record, page 1780).

Copyright : 1857 (fol. 2178) by Webster's children ; 1847 by Chauncey Goodrich, and 1860 by G. & C. Merriam (fol. 2740).

The large sums of money (\$50,000 and various annual payments) paid by complainants in 1858 for the right to share in the privilege of publishing the above two books—although the Lippincott's reserved to *themselves* an *exclusive* right to continue the publication of the Royal Octavo till 1871 (fol. 3178), shows how extensive Lippincott's business in these books was.

The Lippincotts continued to publish the Royal Octavo after 1871, viz., till 1876 or later (fol. 2740).

The Lippincotts also began to publish in 1867 an abridgement of the quarto edition of *Webster's Dictionary* and in 1868 a *Webster's Primary* school dictionary, the rights of which do not appear to have ever been assigned and which, therefore, presumably continued during the copyright period, viz., till 1909 and 1910.

The period the Lippincott's use of the name "Webster" extensively certainly covers twenty years, and, if the last two books above mentioned continued to be published as aforesaid, covers 33 years, of the period of 42 years during which Judge COLT found that the complainant was the SOLE publisher using that name. The Lippincotts' right to use the name "Webster" as the title of a dictionary published by them was, during 20 years or more, expressly recognized by the complainant (Record, p. 795).

IX.

1872 and later.

Publishers : J. DUFFY'S SONS & COMPANY.

Title : *Webster's Pronouncing Dictionary* (Record, pp. 1786, 1787).

X.

1879-1912.

Publishers : HURST & COMPANY.

Title : *Hurst's Peabody Webster* (Defendant's Exhibit).

Copyrighted first in 1879 and very extensively sold (*ib.* and Record, page 1789).

XI.

1880-1889.

Publishers : WORLD PUBLISHING COMPANY, Nassau St., New York.

Title : *Webster's Dictionary*.

A witness personally sold this book two or three years. It was on sale "in the eighties" (fols. 5191, 5192, 5572, 5573).

XII.

1885-1890.

Publishers: WARD, LOCKE & Co.

Title: *Webster's Dictionary*.

This was a set of English publications sold in this country, varying in size from Crown Octavo to pocket editions (fols. 4773-4796).

A witness personally sold these books in "very considerable quantities" between the dates given (Record, fol. 4773), and it does not appear that dealings in it then ceased.

The following Webster Dictionaries, published by Ivison, Blakeman, Taylor & Company, Mason Brothers and American Book Company during the period from 1847 till 1889, had the complainant's name printed on the title page, in small type, under the publisher's name in heavy type; but the obvious effect of the printing of the other name in big type was to associate the name "Webster" solely with the one whose name was conspicuously proclaimed as the source of origin and ownership, and who alone advertised and dealt in the book.

We find the imprint of American Book Company on the covers of such of their books as are in evidence, but no reference on such covers to the Merriams. We find also that the Merriams name was printed usually in association with J. B. Lippincott & Co. of Philadelphia, Wilson Hinkle & Co. of Cincinnati, and others. The question in this case being whether the title Webster's Dictionary is associated in the public mind solely with complainant, it is of utmost importance if complainant has expressly authorized others to use that title extensively in such a way as to associate the title with other publishers.

As the evidence shows that Ivison, Blakeman & Taylor's license to sell the following Webster's continued until the American Book Company succeeded them (fols. 532, 533) in 1892 (fols. 2811, 2812) we assume that their following publications continued until 1892.

XIII.

1856-1857 or later.

Publishers : MASON BROTHERS.

Titles : *Webster's Counting House and Family Dictionary ;*
Webster's Dictionary, and
Webster's High School Dictionary.

Copyrights in 1856 and 1857 by G. & C. Merriam.

On the title pages, in the place where the publisher's name usually appears, we find the following :

" New York

MASON BROTHERS

Springfield, Mass. : G. & C. Merriam."

(Record, pp. 679, 682, 683).

Such an inscription would undoubtedly indicate to the public that Mason Brothers were publishers, and, if anyone noticed the Merriam name, they would find it printed in such a way that it naturally indicated that in Springfield the book might be purchased from the publishers' agents, G. & C. Merriam (Record, pp. 679, 682, 683).

XIV.

1867-1892.

Publishers : IVISON, BLAKEMAN & TAYLOR, New York and Chicago (1872).

Title : *Webster's Primary Dictionary.*

Copyright : 1867 by G. & C. Merriam.

On the title pages, in the place where the publisher's name usually appears, we find the following :

IVISON, BLAKEMAN, TAYLOR & CO.,

New York & Chicago.

Philadelphia : J. B. Lippincott & Co. Cincinnati : Wilson, Hinkle & Co. Springfield, Mass. : G. & C. Merriam " (fol. 2747 ; Record, p. 687).

This would of course indicate that Ivison, Blakeman,

Taylor & Company were the publishers, and might suggest, to anyone noticing the small print beneath, that these various other concerns were local agents for the distribution of the book; but, as a matter of fact, the testimony shows that the Merriams took no part in the advertising, sale or distribution of the various Ivison, or American Book Company Websters. These concerns were conducting their own independent businesses. Furthermore, an inspection of the book discloses the Ivison initials stamped on the covers, and no reference thereon to the Merriams.

XV.

1857-1892 or later.

Publisher: AMERICAN BOOK COMPANY.

Title: *Webster's Academic Dictionary*.

On the title page, in the place where the publisher's name usually appears, we find the following:

**"NEW YORK: CINCINNATI: CHICAGO
AMERICAN BOOK COMPANY.**

Springfield, Mass.: G. & C. Merriam Co."

XVI.

1867-1892.

Publishers: IVISON, PHINNEY, BLAKEMAN & Co.

Title: *Webster's Army & Navy Dictionary*.

Copyright: 1867, by G. & C. Merriam.

Beneath the publishers' name appears:

"Philadelphia: J. B. Lippincott & Co., Cincinnati: Sargent, Wilson & Hinkle. Chicago: S. G. Griggs & Co."

1867.

"G. & C. Merriam, Springfield" (Record, p. 689).

XVII.

1867-

Publishers : IVison, Blakeman, Taylor & Co.

Title : *Webster's New Counting House and Family Dictionary.*

Copyright : 1867, by G. & C. Merriam.

On the title page we find :

New York : IVison, Blakeman, Taylor & Co.

"Springfield, Mass. : G. & C. Merriam.

Cincinnati, Ohio : Van Antwerp, Bragg & Co." (Page 691).

XVIII.

1868-Publishers : IVison, Blakeman, Taylor & Co. *New York.*Title : *Webster's High School Dictionary.*

Copyright : 1868, by G. & C. Merriam.

On the title page we find :

New York : IVison, Blakeman, Taylor & Co.

"Springfield, Mass. : G. & C. Merriam.

Cincinnati, Ohio : Van Antwerp, Bragg & Co." (Page 692).

XIX.

1870-Publishers : IVison, Blakeman, Taylor & Co. *New York.*Title : *Webster's Pocket Dictionary.*

Copyright : 1870, by G. & C. Merriam.

On the title page we find :

New York : IVison, Blakeman, Taylor & Co.

"Springfield, Mass. : G. & C. Merriam" (Page 693).

XX.

1884.Publishers : IVison, Blakeman, Taylor & Co. *New York and Chicago.*Title : "*Webster's Practical Dictionary.*"

Springfield, Mass. : G. & C. Merriam (Page 696).

XXI.

1884.

IVISON, BLAKEMAN, TAYLOR & CO. New York and Chicago (Page 696).

Webster's Condensed Dictionary.

Springfield, Mass.: G. & C. Merriam Company (Page 700).

Even leaving out of consideration the above dictionaries on which the Merriam name appears, in small type, under the publishers' name, we find that between 1847 and 1889 not only were complainants *not* the sole publishers of Webster's Dictionaries, but, on the contrary, that at all times during that period at least one of the following publishers, viz., N. & J. White, J. S. & C. Adams, Harper & Brothers, White & Sheffield, Huntington & Company, Huntington & Savage, Mason Brothers, J. B. Lippincott & Company, Hurst Company, J. Duffy Sons & Co., World Publishing Co. and Ward, Locke & Co. were publishing dictionaries under that title; that, during most of that period, several of these publishers were publishing simultaneously dictionaries under that title, and that, during that period, the right of the following publishers to use the name "Webster" as the title of a dictionary published by them was expressly recognized by complainant by contract or otherwise, viz., Harper & Brothers, 1847-1853 (fols. 3142, 3143), White & Sheffield, 1847-1853 (*ib.*), Mason Brothers, 1856- (p. 678), and J. B. Lippincott & Company, 1857-1876 (p. 795).

Not only were the Merriams not the exclusive publishers of Webster's dictionaries from 1847 till 1889, but the Webster dictionaries published by others, during that period, exceeded the number published by them.

There is not a scintilla of evidence in the record to show how many dictionaries the complainant sold between 1847 and 1864. Presumably it sold Webster Dictionaries during that period because it appears that it published them during that period. That presumption, however, applies with equal force to the other publishers of Webster Dictionaries who are shown to have published them during the same period, and in the absence of evidence as to the number sold by each it must

be presumed that each publisher sold the same number. It follows, therefore, that between 1847 and 1864 the aggregate number of Webster Dictionaries sold by publishers other than the complainant must have exceeded the number sold by the complainant.

There is no evidence to show how many dictionaries the complainant sold between 1864 and 1889 (25 years) unless the evidence of Mr. Washburn that between 1864 and 1912 (48 years) the complainant sold 12,000,000 Websters Dictionaries can be treated as evidence showing how many were sold between 1864 and 1889 (the first 25 years) by a process of apportionment. *Non constat*, however, that between 1864 and 1889, when the business was beginning, the sales were comparatively small, and that each of the other publishers who were selling Websters Dictionaries during that period sold as many Websters Dictionaries as the complainant, making the aggregate of the sales by persons other than the complainant greater than the sales made during the same period by the complainant.

The question of fact in this case is whether complainant has proven, in addition to a complete disassociation of the name "Webster's" with that author's work, an association of the name "Webster's" with it as publisher so extensive, and practically exclusive, that the name "Webster's" has come to be associated exclusively with complainant's publishing house as its trade-name. Therefore consideration must also be given to the fact that, in addition to the above books sold by complainant's competitors between 1847 and 1889, all of the Webster's dictionaries bearing the imprint of other publishers, sold *before* 1847, which remained in circulation *after* 1847, so long as they existed and were referred to, operated to prevent an exclusive association of the title with the complainant. Practically all of the Webster's published by other publishers before 1847 were in circulation during the period from 1847 until 1889, because it is a well known fact that a dictionary remains on the shelves of its buyer or his family and is there consulted for 30 or 40 years after its purchase. Prof. Peck testified that when he was a young man (about 1882-1885) he knew a number of households which possessed and used the 1828 edition of Webster's.

The burden of proof is throughout upon the complainant,

and, it appearing that other publishers were engaged in selling Webster's during the period in question, if complainant expects to diminish the force of that fact by claiming that their sales were less than its sales, it must show what the extent of their sales were.

Indeed, the evidence shows that in 1890, one of the complainant's competitors publishing the reprint of the 1847 edition, disposed of over a million copies in two or three years, and the evidence of the sales of hundreds of thousands of the defendant's books during a brief newspaper campaign shows how the sales of one particular year may be made very great by enterprise in the selling department. Consequently, it would be mere speculation to say that because 12,000,000 copies were sold by the complainant between 1864 and 1912, a period of 48 years, we may presume without evidence either that a proportionate number were sold during the first 25 years of that period or, if so, that the sales of other dealers during that period were less than the complainant's sales—so far less as to make the complainant practically the sole publisher.

On the evidence as it now stands, therefore, it would appear that persons other than the complainant published and sold more dictionaries than it did during the period from 1847 to 1864, and that from 1864 to 1889 there is no evidence to show that the complainant's sales exceeded the sales of its competitors.

Not only, therefore, was the finding of Judge COLT, to the effect that "from 1847 to 1849 the Merriams were the sole publishers of Webster's Dictionaries," erroneous, but it appears, on the contrary, that throughout that period other publishers were selling Webster Dictionaries, and it does not appear that the sales of the complainant equaled the sales of these competitors.

1889 to date.

Publication of Big Dictionaries by Competitors.

Soon after 1889, when the copyright of the 1847 edition expired, many publishers began to republish exact reproductions of that dictionary and sell it, at cheap rates, in

tremendous quantities. There were at least seven of these dealers, namely,

Henry G. Allen.
 Brock & Rankin.
 W. B. Conkey Co.
 M. A. Donohue & Co.
 Geo. M. Hill & Co.
 Geo. W. Ogilvie.
 The Werner Company.

One concern alone, *Donohue & Company*, sold a million of the books in a few years, that is only 200,000 less than the total number of big dictionaries sold by complainant in the 48 years from 1864 to 1912 (fol. 4188). It is fair to presume that the other six publishers of this reprint (who sold at a cheap rate) sold 200,000 or more; for their competition was so lively that complainant soon resorted to its usual tactics of trying to drive its competitors from the field by imposing upon them the heavy expense of defending law suits, like the present one, an almost prohibitive price for most dealers to pay for the enjoyment of their legal right to deal in the Webster product.

Merriam v. Holloway Co., 43 Fed., 450 (1890).

Merriam v. Famous Shoes Co., 47 Fed., 411 (1891).

Merriam v. Texas Siftings Co., 49 Fed., 944 (1892).

In addition to the above reprints Ogilvie and the Saalfeld Company as his successor have published and sold, from 1904, on, and now publish and sell a thoroughly revised and much enlarged Webster's dictionary (fols. 7087, 7088). This book was approved by School Boards in Cincinnati, Philadelphia and Yonkers (fol. 7171). At least one bookseller recommended it as better than the best big Merriam Webster on the market (fols. 5668-5671). Ogilvie spent more than \$70,000 in getting it up and spent about \$100,000 in advertising it. The Saalfeld Company spent \$25,000 in advertising it (fols. 7093, 7097, 7176). Its sales must have been very extensive.

Since complainant's sale of its 1,200,000 big dictionaries extended over 48 years (viz., 1864 to 1912) its competitors' sales of an equal or greater number of big dictionaries has

taken place in the last twenty-two years, it appears that complainant's competitors have, during the lives of the present generation, sold more big Webster dictionaries bearing their imprints than the number sold by complainants bearing its imprint.

Publication of Abridged Dictionaries by Competitors.

In the matter of abridged dictionaries entitled "Webster's" complainant's witness Washburn testified that since 1864 (48 years) some 10,800,000 of complainant's abridged books have been sold.

But we find that the witness includes, in this number, the abridged dictionaries sold to school boards and schools by Ivison, Blakeman, Taylor & Company and American Book Company (fols. 708, 709). These dictionaries, though printed from plates provided by complainant, were "published" (we use their witness' own words, fols. 709, 2614) by Ivison, Blakeman, Taylor & Co. and American Book Company (fols. 538, 709, 710, 2614); were advertised by them at their own expense as their own publications (fols. 532, 533); and were dealt in solely by them.

Complainant omits these books from its printed list of its own publications circulated as an advertisement. It properly omits them; for their publication and sale constitutes no part of the complainant's business (See pp. 659-662).

All these books bore the imprint of the Ivison firm or American Book Company as publishers.

The American Book Company's dictionaries bore its name, only, on the backs thereof.

The sale and circulation of these books, far from tending to create an exclusive association between the name "Webster's" and the complainant, naturally produced the very opposite effect.

The printing of complainant's name, on the title pages, in small print, under the names of these publishers, in big print, was so inconspicuous and unmeaning, that it in no way associated them with these publishers' trade.

Is it conceivable that the trade built up by these firms in

Webster's dictionaries would go to the complainant if these firms ceased to use complainant's plates, omitted the ambiguous and inconspicuous printing of complainant's name in small print under their own names in big print on the title page, and, under their own names, as before, published and sold Webster's dictionaries printed from *defendant's* plates?

If that question be answered "No," then it follows that the Webster Dictionary trade built up by the Ivison firm and American Book Company is associated exclusively with and attached exclusively to those firms and not at all to the complainant; and that the name "Webster's" on their dictionaries does not mean dictionaries published by the complainant.

The circulation of dictionaries entitled "Webster's" in the schools is the fact upon which complainant has placed its principal reliance to prove extensive association of the name "Webster's" with it. It now appears that the association of the title Webster's on those books was not with complainant, as publisher and dealer, but with the Ivison firm and its successor, American Book Company.

As the schools were the largest fields for abridged books, we may fairly assume that more than half of the 10,800,000 abridged books referred to by the witness, Washburn (fol. 538), were books published and dealt in by the Ivison firm and American Book Company as their publications.

The terrorizing, which complainant has carried on by putting every successful publisher of Webster's dictionary to the expenditure of thousands of dollars to defend suits like this one, has made it impossible to secure from many of such publishers proof of the extent of their sales. But we can prove by inference that its competitors' sales have greatly exceeded complainant's.

More than half of the 10,800,000 referred to by Washburn turn out to be publications of the Ivison firm or of the American Book Company. Making the most favorable assumption which complainant could ask, namely, that one-third of the 10,800,000 (*i. e.*, 3,600,000) were sold during the 25 years from 1864 to 1889, and two-thirds (*i. e.*, 7,200,000) were sold during the 23 years from 1889 to 1912, and that "the greater part" of these which American Book Company published and sold was only a little over half, it would seem that complainant pub-

lished and sold 3,500,000 abridged dictionaries from 1889 to 1912. Add the following :

The sales by newspapers of defendant's Webster's must have exceeded 500,000 or 600,000 when the testimony was taken, and have continued undiminished, unaffected in the slightest degree by the cautionary notice which the average buyer is not interested in, because the average buyer has no preference for the publisher to which it refers.

Laird & Lee's Webster's, on sale since about 1892 (see fol. 5000), have been adopted by the public schools of the States of Indiana, Illinois, Ohio, Michigan, Maryland, Kansas, Nebraska, Missouri, Oklahoma and Utah, and especially in the cities of Baltimore, Chicago, Indianapolis, Salt Lake City, Los Angeles and Seattle. Moreover, the Webster's Dictionaries published by Laird & Lee have been awarded gold medals at the great expositions of St. Louis, Charleston, Portland, Oregon, and the Pan American at Buffalo (fols. 5010-5012). The firm of Laird & Lee alone claim to have spent as much money as the Merriam Company in advertising the name "Webster's" (fol. 4194). The extent of that firm's sales may be inferred from the fact that it has sold over 1,000,000 Webster's Vest Pocket Dictionaries. (See advertisement in defendant's exhibit "Laird & Lee's Webster's Modern Dictionary.") Laird & Lee's publications include :

Webster's Modern Dictionary (fols. 5000, 7322).

Webster's Vest Pocket Dictionary (fol. 5000).

Webster's People's Dictionary (fol. 4027).

Webster's Family Dictionary (fol. 4833).

Webster-Grimm Dictionary (fol. 7107).

Webster-Salva Dictionary (fol. 7107).

Webster-Littre Dictionary (see advertisement in "Webster's Modern Dictionary").

Webster's New Standard Dictionary. Elementary School Edition.

Webster's New Standard Dictionary. Intermediate School Edition.

Webster's New Standard Dictionary. Common School Edition.

Webster's New Standard Dictionary. Illustrated Library Edition.

Webster's New Standard American Dictionary. Encyclopedic Edition (fols. 7322-8).

Ogilvie's and Saalfeld's sales of their abridged dictionaries, with \$125,000 of advertising, must have been very extensive, though we could not secure exact evidence of their extent because of a suit for an accounting threatened by the Merriams.

The complete list of publishers, mentioned in the record, who published and sold dictionaries with "Webster's" in the title, between 1889 and the present day, is as follows :

Publishers of Webster's Dictionaries from 1889 to date.

Alden & Company, fol. 5684,

" Webster's Unabridged," fol. 5707.

Henry G. Allen, fols. 5000, 7113,

Webster's Unabridged. Leon testified that he knew this book as early as 1890.

Allison,

Webster's Dictionary, fol. 4062. Mentioned by Hale in cross-examination.

American Book Co., McKnight, page 1421.

Barse & Hopkins, fol. 4026,

Webster's Home, School & Office Dictionary, fol. 4055.

W. B. Bechtold, fol. 7112.

Brock & Rankin, Chicago, Ill.,

Webster's Unabridged Dictionary, reprint. Fols. 4196, 4776, 4793.

Doran dealt in this book. His largest dealings were about 1900.

William Bulger, Chicago, Ill.,

Webster's Pocket Dictionary & Speller, copyrighted 1895, imprint 1895. Book offered in evidence, fol. 7314. On sale, 1912.

A. L. Burt, New York, N. Y., fols. 4027, 7111,

A Concise Webster's Dictionary, copyrighted 1895.

Book purchased in 1912; no date in imprint; offered in evidence fol. 7315.

Commonwealth Publishing Co., New York, N. Y.,

Webster's American Standard Dictionary. Copyrighted 1909; book purchased 1912. Offered in evidence fol. 7316.

- W. B. Conkey Co., Chicago, Ill., fol. 7106,
 Webster's Original Unabridged Dictionary,
 Webster's Business & College Dictionary. This book
 offered in evidence fol. 7320; copyrighted 1911; im-
 print 1911, with 1910 census; purchased 1912.
- Cupples & Leon Company, New York, N. Y., fol. 5026,
 Webster's New Century Dictionary, published from the
 middle of 1907 to 1912.
- M. A. Donohue & Co., Chicago, Ill., fols. 7106, 4187, 4999,
 1421,
 Donohue's Vest-Pocket Webster.
 Donohue's Handy American Webster.
 Donohue's Reprint of Webster's Unabridged, over a
 million copies (fol. 4188).
 Webster's Library Dictionary for Home, School & Office,
 fol. 4027. Last book offered in evidence fol. 7316;
 copyrighted 1911; called 1911 edition, on sale 1912.
- Donohue & Henneberry, Chicago, Ill., fol. 4216,
 Vest-Pocket Webster's Dictionary,
 Webster's Unabridged Dictionary,
 Published from about 1894 on, fol. 5001.
- Excelsior Publishing Co., New York, N. Y., fol. 7112,
 Excelsior Webster's Pocket Speller & Definer; offered
 in evidence fol. 7313; copyrighted 1892. On sale,
 1912.
- Frank Brothers, fol. 7112.
- Funk, Michigan, fol. 4197.
- Hampden Publishing Co., fol. 7111.
- George M. Hill & Co., Chicago, Ill., fols. 5683, 4199, 4790,
 Webster's Unabridged Dictionary, a reprint, fol. 4027;
 Webster's Vest Pocket Dictionary, offered in evidence
 7311; copyrighted 1899; purchased 1912.
- John Hovenden,
 Webster's Standard American Dictionary, fol. 4998.
- Hurst & Co., New York, N. Y., fol. 4833,
 Webster's Pocket Dictionary.
 Hurst's Webster's Dictionary, offered in evidence, fol.
 7315; copyrighted 1879 and 1882; imprint 1912.
 Ogilvie testified, fol. 7111 and 7115, that this book had
 a "large sale in the seventies"; Leon testified that he
 knew this book in the early nineties, fol. 5001.

Iverson, Blakeman, Taylor & Co.,

Mentioned by Hale as "a licensee publishing a Merriam's dictionary under arrangement with Merriams," fol. 7249.

Laird & Lee, Chicago, Ill.

Webster's Modern Dictionary, awarded gold medal and diploma, Lewis & Clark Centennial Exposition, Portland, Oregon, 1905, fol. 4996. Offered in evidence, fol. 7322 ; copyrighted 1895, 1899, 1903, 1905, 1906, on sale 1912.

Vest-Pocket Webster's, fol. 5000, sold, as testified by Leon, in early nineties, about 1893. Described in advertisement at back of Webster's Modern Dictionary, (See above) as "the first vest-pocket Webster's dictionary ever published, over a million copies sold."

Webster's New Standard Dictionary of the English Language, Elementary School Edition ; offered in evidence fol. 7323 ; copyrighted 1907, on sale, 1912.

Webster's New Standard Dictionary of the English Language, Intermediate School Edition ; offered in evidence fol. 7324 ; copyrighted 1906-1907 ; on sale 1912 ; entered at Stationer's Hall, London, England.

Webster's New Standard Dictionary of the English Language, Common School Edition ; awarded gold medals and diplomas at World's Expositions, offered in evidence fol. 7325 ; copyrighted 1903, 1904, 1905, 1907, 1908, 1911 ; entered at Stationer's Hall, London, England. On sale 1912. Déposé au Ministère de l'Intérieur et à Bibliothèque Nationale, Paris, France.

Webster's New Standard Dictionary, Illustrated Library Edition, gold medal awarded 1904 ; awarded gold medals at leading World's Expositions ; offered in evidence, fol. 7327 ; copyrighted 1903, 1904, 1905, 1907, 1908 ; entered at Stationer's Hall, London, England. Déposé au Ministère de l'Intérieur et à la Bibliothèque Nationale, Paris, France. On sale, 1912.

Webster's New Standard American Dictionary, Encyclopedic Edition ; offered in evidence, fol. 7328 ; copyrighted 1911, on sale 1912.

Webster's People's Dictionary, fol. 4027.

Webster's Family Dictionary, fol. 4833.

Webster Grimm Dictionary, fol. 7108.

Webster Salva Dictionary, fol. 7108.

Webster Littré (see back of Webster's Modern Dictionary).

Lamont, O'Donnell & Co., fols. 7112, 4196.

Loomis Brothers, fols. 7112, 4196.

David McKay, Philadelphia, Pa., fols. 4997, 7280, 4834, 5646, 7107.

Webster's Vest-Pocket Dictionary.

Madison Book Company, Chicago, Ill.

Webster's Twentieth Century Dictionary, fols. 2434, 2651; copyrighted, 1902.

Marsh & Company, fol. 4196.

E. E. Miles, South Lancaster, Mass.,

Miles' Vest-Pocket Webster's, fol. 7106.

Webster's Common Sense Dictionary, fol. 4833.

Monarch Book Company, fol. 4998.

Mutual Publishing Company, fol. 7112.

National Publishing Co., Philadelphia, Pa., fol. 4998,
Webster's Dictionary.

F. Tennyson Neely, Chicago, Ill., and New York, N. Y., fol. 4027.

Webster's Pronouncing Dictionary; offered in evidence,
fol. 7314; no copyright, imprint 1895. On sale, 1912.

George W. Noble, Chicago, Ill.

Peerless Webster Self-Pronouncing Dictionary; offered
in evidence, fol. 7313; copyright 1899; imprint 1911;
on sale, 1912.

George W. Ogilvie, Chicago, Ill., and New York, N. Y.,

Published five Webster's Dictionaries, fol. 7111.

George W. Ogilvie & Co.,

Published one Webster's Dictionary, fol. 7111.

I. & M. Ottenheimer,

Vest-Pocket Webster's Dictionary, fol. 7112.

R. S. Peale & Co., fol. 4196, 7112.

People's Publishing Co., fol. 7111.

Popular Publishing Co., fol. 4027,

Webster's Pictorial Dictionary.

Reilly & Britton, Chicago, Ill., fol. 4195.

Riverside Publishing Co., Chicago, Ill., fol. 7295.

Thin paper edition of Webster's Universal Dictionary.

Saalfeld Publishing Co., Akron, O., fols. 7110, 4998, 4833, 4196, 7308.

Webster's Encyclopedic Dictionary,
 Webster's Vest-Pocket Dictionary,
 Webster's New Unabridged Dictionary,
 Webster's Imperial Dictionary,
 Webster's Intercollegiate Dictionary,
 Webster's Adequate Dictionary,
 Webster's Sterling Dictionary,
 Webster's Original Unabridged Dictionary,
 Webster's Reliable Dictionary, fol. 4026.

Success Publishing Co., fol. 6765.

Syndicate Publishing Co., fol. 1249.

Webster's New Illustrated Dictionary,
 Thompson & Thomas, Chicago, Ill., fols. 4027, 4196, 7119.

Webster's New Unabridged Dictionary, fol. 4832,
 Webster's Vest-Pocket Dictionary, fol. 4832,
 Webster's School & Office Dictionary; offered in evidence
 fol. 7317; copyrighted 1901, 1903, 1905; imprint 1909;
 on sale, 1912.

C. C. Thomas & Co. Chicago, Ill.,

Webster's School & Office Dictionary, fol. 4908.

W. R. Van Sant, fol. 7111.

L. W. Walter Co., Chicago, Ill., fol. 7107,

Webster's Modern Dictionary for Home, School & Office;
 offered in evidence fol. 7321; copyrighted 1907, 1908;
 called 1910 edition; on sale, 1912.

Wehman Brothers, New York, N. Y.,

Latest Vest-Pocket Webster's; offered in evidence, fol.
 7311; copyrighted 1893, 1894, 1908; on sale, 1912.

E. A. Weeks Company,

Vest-Pocket Webster's Dictionary, fols. 5683, 5705; title
 changed afterwards.

Werner Company, Akron, O.,

Webster's Encyclopedia Dictionary, fols. 7109, 7380, 4236.

John C. Winston Co., Philadelphia, Pa., and Chicago, Ill., fol.
 7111.

Webster's New Self-Pronouncing Dictionary, fol. 4997,
 Webster's Universal Self-Pronouncing Dictionary, fol.
 4026; offered in evidence, fol. 7318; copyrighted 1908,
 1911. McKnight "sold quite a bunch of these" in
 December, 1911, in Philadelphia, fol. 5689.

Summary of Testimony Re Advertising By Other Publishers Than the Merriams.

Hesslein (fol. 4038). After giving list of non-Merriam publishers, witness says these books have been advertised in trade papers and newspapers and by catalogs, also by retailers in the newspapers. Witness could give no estimate of cost. His period of observation 22 years, during which, he said, "I believe I have seen more advertising from others than from the Merriam Company" (fol. 4032). In this he had not included the "expensive newspaper advertising" of the Syndicate Publishing Co. (fol. 4034).

Witness Donohue spent \$100,000 in the early nineties advertising his reprint edition. He spent from \$15,000 to \$20,000 advertising his other Webster dictionaries (fol. 4190). In the 12 months ending May 3, 1912, he spent \$5,000 advertising these dictionaries (fol. 4206). During the last 20 years his "impression is that about a fifth of all the Webster's dictionaries advertised that" he had "observed were advertised by the G. & C. Merriam Co." (fol. 4193). Witness said, "Mr. Lee told me that he had spent as much money as Merriam had advertising the name Webster's" (fol. 4194). At folio 4198 witness mentioned the following mail order houses as having advertised Webster's Dictionaries: Sears, Roebuck & Co.; Montgomery, Ward & Co.; John M. Smyth & Co.; Cash Buyers Union; Universal Supply Co.; David B. Clarkson Co.; Book Supply Co. Some of the catalogs of these houses are printed by the witness, Donohue, himself (fol. 4204). Witness said (fol. 4201) with reference to the advertising in these catalogs, "I have seen more advertising of Webster's books of other publishers than I have of Merriams in these catalogs" and at fol. 4204, "I estimate during the last 20 years about one-fifth of the advertising was Merriam and about four-fifth others. That is the advertising I have seen in those catalogs."

Wright testified, at fol. 4332, that "to the best of my knowledge and belief the amount" of advertising devoted to the books of the Syndicate Publishing Co. between February, 1911, and May, 1912, "would exceed \$500,000." At fol. 4330 he said the advertising was in the newspapers of

"between 300 and 400 towns and cities in the United States and Canada" running in each place "from four to six months and occasionally a shorter period." At fol. 4539, the witness said, supplementing his earlier statement, "I have since had the advertising measured up and at the current rates of the newspapers I find that if the space had been paid for the total amount would exceed two and one-half million dollars." At folios 4542-4545, the witness said, "the combined circulation of the newspapers which advertised the dictionary" is calculated to be "in excess of 600,000,000." "In each one of these newspapers appeared the announcement of the dictionary."

Witness Sherwood, at folio 4855, said: "The G. & C. Merriam Co. published one or two varieties of dictionaries, while the balance of the publishers co-jointly published hundreds of various Webster's dictionaries, all of which they advertised in a great many directions." Asked what proportion of advertising was in the name of the G. & C. Merriam Co., the witness said (fol. 4856): "I should say that a conservative estimate of the ratio would place it at about five to one in favor of the numerous publishers, possibly greater than that." Folio 4857, witness's estimate based on whole experience in book business, which had continued (fol. 4827) upwards of 20 years.

Witness Leon testified at folio 5003 that during 24 years in the book business he had seen advertising by other publishers, consisting of newspapers, circulars, catalogues of publishers and catalogues of mail order houses. At folio 5004 the witness said: "I think almost every dry goods house that handles books and dictionaries has advertised" Webster's dictionaries not published by the Merriam Co. Witness said fol. 5006) that during the past 15 or 20 years Montgomery, Ward & Co., Sears, Roebuck & Co., and the Book Supply Co. of Chicago, had to his knowledge advertised Webster's dictionaries not published by the G. & C. Merriam Co. These mail order houses distribute from two to five million catalogs each year. At fol. 5008, witness estimated advertising given to Webster's dictionaries not published by Merriam in the last 20 years, not including the recent advertising of Syndicate, at over a million dollars.

Evidence of how the advertising of Syndicate boomed the Webster business is found in testimony of McKnight at

fol. 5691. Witness was selling Winston's Webster's in Philadelphia during Syndicate campaign in Philadelphia Press. "Many customers asked for book advertised by Press" (fol. 5692). "In that way I discovered I was getting benefit from the Press advertising."

Peck (fols. 6312-6315): "This I may say; it is a matter of publicity. You are perfectly well aware of that. The Merriams do not advertise Webster's dictionary very much. You would hardly know there was a Webster dictionary in the country if you left it to them, but all the other publishers of Webster's dictionary, or the Websterian dictionary, whichever you like, spent immense amounts of money advertising their books, and they sell them at prices—very good books they are too, many of them—they sell them at prices which put the possession of them in the hands of people that could not afford to buy a great big unabridged ten or twelve dollar book, so I say that every book that bears the name of Webster's dictionary has contributed to the benefit and the pecuniary profit of the Merriams and in a way to perpetuating the name of Webster in connection with dictionaries. If there were not any small dictionaries bearing the name of Webster, I do not believe the Merriams could make any money out of their work. There have been millions of dollars spent in advertising these abridged dictionaries."

The witness Ogilvie, at folio 7091, said that during 13 years, ending in 1904, while preparing his revised and enlarged Webster's, he had from one to 100 assistants. He kept no accurate account of his expenses prior to the last or the thirteenth year. During that year his expenses were \$70,000. "It might have been as much more or more than as much more" prior to that time. At folio 7097, Ogilvie testifies that he spent \$100,000 advertising his Webster's Imperial or Webster's Universal during the years 1903 to 1908 (fol. 7152). Ogilvie observed advertising for thirty years closely. Webster's dictionary was exploited with everything in connection with which a dictionary could be sold, from typewriter ribbons to suits of clothes and household furniture. Advertised in newspapers very extensively; in magazines extensively; in catalogues of mail order houses "Sears, Roebuck & Co., John M. Smythe Co., Cash Buyers Union, The Book Supply Co., Sims, Wilson & Sims, all of whom do a very extensive mail

order business and issue millions of catalogues a year. One of the concerns alone, Sears, Roebuck & Co., issue approximately 7,000,000." Folio 7156—most of the Webster's dictionaries exploited by the mail order houses were published by other houses than Merriam. Folio 7158—many publishers also used canvassers. Folio 7162—"I should say that not less than \$5,000,000 worth of" advertising by other publishers than Merriam "have been under my observation." Folio 7163—"I have seen very little of Merriams' advertising as compared with the others—a very small percentage." Before 1890, during a period of eight years, when the witness testified he had closely observed advertising by various publishers of dictionaries (fol. 7150), witness said (fol. 7165) that so far as his observation was concerned the advertising of the Merriam Co. had not been extensive. Folio 7163—there was not a great deal of advertising of Webster's dictionaries before 1890. After 1890 they were "exploited from coast to coast" and advertising increased "by leaps and bounds" (fol. 7164). Folio 7176—advertising of the Saalfeld Co. in connection with its Webster's dictionaries to Ogilvie's knowledge amounted to \$25,000. "That figure was not more than 25 or 30 per cent. of the total."

Facts showing that "Webster's" as the title of a dictionary has uniformly been used as the name of Webster's work in the book.

As further negating complainant's claim that the name "Webster's" ceased to be the name of Webster's work, and came to mean one publishing house we call attention to the following facts:

All dictionaries in circulation or published under the title "Webster's" either by complainant or by its competitors, were, up to 1864, wholly Webster's work, and those published from 1864 until 1909, by complainant and its competitors, retained Webster's most famous work, his definitions of the standard words of the language. Therefore the name "Webster's" could not mean anything but Webster's work in these books.

Not classing as revisions the complainant's 1847 edition, which complainant admits "was little more than the original work of 1828 brought from two volumes into one, pruned of some excrescences, and with moderate additions" (See Pre-

face to Webster's International), nor the additions, from time to time, of supplements and appendixes, the complainant's first revision of Webster's dictionary was made in 1864. It was entitled "Webster's Unabridged." A second revision was made in 1890 and was entitled "Webster's International." Complainant still sells both of these editions (fols. 2643, 2635).

In both of these books, viz., its editions of 1864 and 1890, complainant judiciously conserved

"those definitions of standard words which are Dr. Webster's especial merit"; and proclaimed that its book "retains that excellence in definitions which has made Webster the safe and familiar authority to which judge, journalist, scholar, artisan and business man refer."

See Publisher's statement in Webster's International.

As all the Webster's dictionaries of its competitors retained this distinguishing matter it appears that Webster's in the title of every dictionary published during the 58 years from 1806 until 1864 contained Webster's work, only, and that, from 1864 to date, all dictionaries so entitled (except complainant's 1909 edition) retained that body of excellent definitions of standard words which was Webster's best known product.

"Webster's" has, therefore, for 107 years described a definite and famous product, and has never lost its purely descriptive signification in the title of a dictionary as the name of that part of the book which Webster wrote.

The complainant itself has always used the name "Webster's" solely as the name of that part of the book which Webster wrote.

This is shown by the fact that

(a) From 1847 to 1890 always, and from 1890 until to-day on its "Unabridged" dictionary it stated in the most conspicuous type used on its title pages that the dictionary was "by Noah Webster, LL.D." and it always separately described under the names of the authors thereof, the revised or added matter contained in the book which Webster did not write;

(b) It always inserted opposite the title page a full-page engraving of Dr. Webster ;

(c) It always published in each of the books a memoir of Webster, which said in its first paragraph :

" It is natural for those who make frequent use of a work like this to desire a knowledge of the *author's* life ; "

(Italics ours).

(d) It always printed after the memoir of Noah Webster his own preface to the 1828 edition, under the title "*Author's Preface.*" The prefaces which followed by Goodrich and Porter were entitled "*Editor's Preface.*" (Italics ours).

(e) It always used distinctive titles to indicate the work of the editors, as distinguished from Webster as author of its books. Thus, when, in 1890, it published a dictionary which contained in addition to Webster's definitions of standard words, revised or added matter not written by Webster, it ceased to entitle the book merely " Webster's Dictionary " and added the new title " International " to identify the new matter in the new edition of that year, and in 1909 it added the new title " New International " to identify the new matter in that edition. Its editions of 1890 and 1909, as it admits in one of its prefaces, were in fact " popularly known " respectively as " the International " and " the New International. " In the preface of its 1909 edition occurs the following :

" In 1890 appeared another complete and more radical revision of the entire volume. Its new title, ' Webster's International Dictionary, ' marked the fact that the work of Webster and his successor had * * * been enriched by the scholarship of various people. "

Speaking of the title, " An American Dictionary of the English Language, " the complainant in its 1890 edition states :

" While always hitherto retained on the title-page, the adjective long ago passed out of popular use as a description of the book, which has for many years been known as the ' Unabridged. ' * * * "

Complainant then continues :

" Why now International ?

"Now, upon the issue of an edition so materially altered and improved as the present one is, the occasion seemed appropriate for a modification of the title."

Throughout the record we find the witnesses using the short titles, "the International," "the new International," as the distinguishing identifying titles of the revisions so named by the complainant.

(f) From the beginning complainant always conspicuously displayed, on the books it published and sold, its name "G. & C. Merriam" or "G. & C. Merriam Company." This name, signifying wholly origin and ownership, has been its only natural trade-name. This is the only name which has been exclusively used by it and exclusively associated with its dictionaries. The trade attached to this name is the only trade to which complainant is exclusively entitled. (This point is more fully discussed at pp. 105-7).

As the complainant has never ceased to proclaim Webster as the author of the principal part of the book which it published under the title "Webster's" Dictionary how can it have the effrontery to pretend that the public has disbelieved its reiterated assertion of that true fact, and has insisted on distorting the natural meaning of the term into a signification wholly different, viz. : as the fanciful name of a publishing house?

The facts heretofore stated are those which bear on what may be called the "Probabilities" as to whether "Webster's" in the title of a dictionary has wholly departed from Webster's personality as an author and has become exclusively associated in the public mind with one publishing house, as its commercial trade symbol.

We believe that the facts heretofore stated render it not only improbable that "Webster's" has departed from its natural and necessary signification, but on the contrary show affirmatively that his name in the title of dictionaries retains *its natural* meaning as the name of his work, and could not possibly, under the foregoing circumstances acquire a secondary meaning, signifying a single publishing house.

We next come to the direct evidence of this subject.

Opinion Testimony and Evidence of Ordinary Purchasers.

We do not believe that the Court will pay much attention to the opinions of the librarians and publishers who undertake to tell what understanding of the name "Webster's" dictionary resides in the mind of the average purchaser, especially when we find that only two of the 24 purchasers of our book, chosen by complainant, from among 500,000 or 600,000 as most favorable to its contention, exhibit any understanding of the term which even approximately corresponds with the foregoing opinions on that subject, the other twenty-two affirmatively or by clear implication contradicting the opinions referred to.

The publishers examined, adopted complainant's audacious theory that Noah Webster's fame and the fame of his product is its own personal property, the commerce in which it has a right to monopolize by monopolizing the title "Webster's."

The rule of expired copyrights which complainant and its fellow publishers purposely or through ignorance ignore may be stated as follows: If the complainant's commercial enterprise has kept alive a demand for the Webster product which is in the public domain, but that demand is wholly satisfied by an offering of the Webster product by any publisher, then any producer of the Webster product is entitled to enjoy the benefits of the demand for that product which the complainant's commercial enterprise aided to create.

A.

OPINION TESTIMONY.

Complainant's Witnesses:

Wadlin (page 467 *et seq.*), librarian of the Boston Public Library, says little that helps the complainant. He thinks that the present reputation of "Webster's" dictionaries is based on the complainant's 1864 edition (fol. 1873). That edition is in the public domain.

Mead, Editor of the "New England Magazine", says much that indicates that, in spite of his personal preferences for the

later *philology* of the Merriam books (defendant's book contains no philology), that the average buyer of a cheap book means by "Webster's", Webster's work (fols. 1896, 1899, 1900, 1922, 1923).

Draper, Commissioner of Education of the State of New York has for 40 years owned a "Webster's Unabridged" (fol. 1999) (the 1864 edition which is in the public domain) which he praises highly. Incidentally this shows how long a dictionary remains in circulation after its purchase. His affidavit was accepted by defendant in lieu of testimony and without cross-examination.

Funk (page 362) is a publisher, imbued with a prejudice in favor of publishers'. He evidently believes that publishers ought to enjoy exclusive rights beyond the copyright period. He admits that the 1828, 1847 and 1864 editions (all in the public domain, the first two being Webster's work, only, and the last containing his definitions of standard words), built up the Webster reputation (fol. 1453).

Putnam (page 390), a publisher, is imbued with the publisher's prejudices, but admits that, in a mail order establishment, an order for the best 50 cent Webster's Dictionary, would be properly filled, in the opinion of those people, by any Webster's dictionary selling for 50 cents (fols. 1573, 1574).

Van Dyck, a former employe of publishing firms, now an editor, thinks the 1864 edition has the highest repute (fol. 1335).

Adams and *Haymarket*, sales agents of complainant's (pages 491 and 368), *Buddecke* (page 258), *Gifford* (p. 239), *Porter* (p. 420) and *Robinson* (p. 407), loyal salesmen and employees of complainant, express opinions, regarding what ideas reside in the public mind, of a kind favorable to their employer. They made a few unwary admissions, however, such as that of Porter, that all of the general public know Merriam's *by name*, as the publishers of Webster's dictionaries (fol. 1681); Buddecke's naive complaint that persons who bought defendant's book, even when told that it was not published by the original publisher, still considered that defendant's book was "genuine" and could not be argued out of it (fol. 1068) is significant; Gifford testifies that he has found Webster's dictionaries other than complainant's, used in schools (fol. 976), etc.

Defendant's Witnesses:

Little, member of the New York City Board of Education. Name "Webster's" in a dictionary not connected with any particular publisher, there being many on the market (fols. 6754-6759).

Hesslein (fol. 4020), *Pfansteil* (fols. 4066-4078), *Schultz* (fols. 5214, 5215, 5221-5228), *McKnight* (fols. 5681-5689, 5694, 5712), *Sherwood* (fols. 4828, 4830, 4832-4835, 4847), *Doran* (fols. 4772, 4773, 4778, 4779), and *Eckle* (fols. 5581, 5583, 5591), all disinterested witnesses, retail salesmen of long experience in Webster's dictionaries published by the Merriams and various other purchasers, testify that the average buyer has no preference for one publisher rather than another, when the various Webster's dictionaries of the various publishers are displayed to him, side by side.

B.

EVIDENCE OF "ORDINARY PURCHASERS."

It should be borne in mind that complainant has been litigating the "Webster" question for over twenty years, and that its agents and salesmen all over the country have been engaged in collecting evidence to support its claims, under the guidance of zealous counsel.

During that period millions of dictionaries entitled "Webster's" have been sold by complainant's competitors. This defendant alone sold 500,000 or 600,000 "Webster's" dictionaries.

Therefore, the alleged "deceived purchasers," whose testimony is produced in this case, must be nearly all who exist, and their testimony must be the strongest which it was possible for complainant to produce in support of its claims, and to sustain its heavy burden of proof.

Of the twenty-four purchasers of Webster's dictionaries produced by complainant as witnesses twenty-two were purchasers of defendant's dictionary, one (fol. 729) of the Saalfeld book and one (fol. 1551) of some other publisher's book.

Seven were from Springfield, complainant's home ; nine from Brooklyn ; three from Buffalo ; four from New York ; and one from St. Louis—scarcely a representative group geographically, when the burden of proof is on the complainant to negative the strong presumption that " Webster's " means to average purchasers throughout the United States what it originally implied and naturally signifies.

Two, Neuchterlein (fols. 1778-1798) and Haggarty (fol. 1766), testified specifically that they were not deceived.

With the exception of two none negated the presumption that " Webster's " as the title of a dictionary meant to him what it naturally signifies, namely, a dictionary *by* Webster. On the contrary, eleven who were asked the question directly testified that Webster's in the title of a dictionary meant to them Webster's work revised and brought up to date, viz. : Gash (fols. 1095, 1096), Foley (fol. 1124), Lutz (fols. 1200-1202), Burlingham (fols. 1269, 1270), Catherine (fols. 1396-1398), Gelhart (fols. 1408, 1409), Smack (fols. 1440-1444), Fisher (fols. 1753-1756), Wells (fols. 1670, 1671), Hughes (fol. 1296), and Seybel (fol. 997).

All of the foregoing witnesses negated the suggestion that " Webster's " might imply a publisher. Gash (fols. 1102, 1103), Catherine (fol. 1396), Fisher (fol. 1751), Hughes (fol. 1300), Smack (fol. 1444), Wells (fol. 1671), Burlingham (fols. 1269, 1270).

Nine of the twenty-four, namely, Boynton (fol. 729), Cowles (fol. 405), Clark (fol. 750), Crossman (fol. 820), Haggarty (fol. 1766), Kronvall (fol. 840), Pulsifer (fol. 832), Rogers (fol. 782), and Seybel (fol. 997), knew the Merriams by name as publishers. Their reason for supposing it was a Merriam book was, first, that they were ignorant of the fact that there were other publishers of Webster's dictionaries beside the Merriams ; and, second, they never examined the book. Had they examined the book they would, of course, have seen that the Merriams were not the publishers of it.

Two, only, out of the entire 24, namely, Cowles and Clark, testified that " Webster's " in the title of a dictionary meant to them not Webster's work, but dictionaries published by the Merriams only. Both of them live in Springfield, the home of the complainant, and one of them, Clark, a personal friend of

the officers of the complainant, exhibits his prejudice by the following exaggerated statement :

" Q. If anybody else than the Merriam Company should publish a reprint of a dictionary which they had published, would you or not consider that a genuine ' Webster ' ? A. I would not " (fols. 768, 769).

Analysis of the Testimony of Complainant's Alleged "Average Buyers."

1. *Boynton*, Springfield. Knew Merriams by name (fol. 729). Bought " Webster's Inter-Collegiate Dictionary," which is not defendant's book. As soon as he saw the title page with publisher's name he was undeceived (fol. 740). His question when he bought, " Is it published by the G. & C. Merriam Co. ? " (fol. 727) shows name " Webster's " didn't mean to him that they were necessarily the publishers. Careless purchaser.

2. *Cowles*, Springfield (fol. 403). Knew Merriam by name as publishers (fol. 405). Didn't examine book when he bought it (fol. 709). Careless purchaser. Didn't know others published Webster's dictionaries (fol. 420) but defines a " genuine " Webster as a book published by Merriams, whether based on Noah Webster or not. He evidently does not mean this, however ; for, after knowing that defendant's book is not published by the Merriams, he says that he doesn't know whether it is or is not " genuine " (fol. 412). This witness and next are the only two who support complainant's claim. He is a violent partisan of the complainant (fol. 417).

3. *Geo. J. Clark*, Springfield (fol. 748). Knew Merriams as publishers by name (fol. 750), personal friend of officers (fol. 772). Didn't examine book (fol. 752). As soon as he saw Syndicate Publishing Company's name he was undeceived. Careless purchaser. Thinks a book would be " genuine " Webster if Merriam, even though none of Noah Webster's work was in the book (fol. 752). Extent of prejudice shown as follows :

" Q. If anybody else than the Merriam Company should publish a reprint of a dictionary which they had published, would you or not consider that a genuine ' Webster ? ' A. I would not " (fols. 768, 769).

Witness's glib echo of his attorney's reference to " the genuine series of Webster's dictionaries " shows careful coaching (fol. 760).

4. *Crossman*, Springfield. Age 53 (fol. 808). Knew Merriams by name as publishers since 1877 (fol. 820). Ignorant of the fact that there were other publishers (fols. 813, 814). Didn't examine book carefully enough even to know the title (fols. 810, 811). Careless buyer. Thought it was a Merriam book because a Springfield paper offered it (fols. 811, 812). He supposed it was a Merriam book because the Webster's dictionary he had at home was published by that firm (fol. 813).

5. *Catherine*, Brooklyn. Age 45. His testimony helps the defendant. Knew Webster's Dictionary when a boy (fols. 1385, 1386). (Evidently 1864 edition). Didn't know the name of publishers of Webster's or that there was more than one (fol. 1390). Name " Webster's " means to witness name of a standard work, and is not connected in his mind with any particular publisher. He didn't think of publisher (fol. 1396). After being fully informed that complainant was *not* the publisher of defendant's book, he testified :

" Q. Do you know whether or not the book which you bought is a genuine Webster's Dictionary ?

A. No, sir " (fol. 1392) ;

showing that a " genuine " Webster meant to him *not* a book published by complainant, but a book containing Noah Webster's work. This is made certain by the following :

" (BY MR. HALE) :

" Q. When you bought this book did you expect to get a dictionary written by Noah Webster himself ? A. Yes, sir " (fol. 1397).

6. *Condit*, New York. His affidavit read by consent in lieu of oral testimony. On receipt of a leaflet from

the Saalfeld Company of Akron, Ohio, advertising their Webster's Imperial Dictionary he wrote to Merriams supposing Saalfeld had relations with it (fols. 1551, 1554). We know Saalfeld advertisements had fraudulent features which tended to create the belief that it was connected with the Merriams. Testimony of deception caused by their book or advertisements is obviously not relevant.

7. *Foley*, Brooklyn. His testimony helps the defendant. Went to school in '85, and then knew reputation of Webster's (fol. 1112), so evidently '64 edition.

Didn't know Merriam's by name (fol. 1114). Read cautionary notice after he bought book (fols. 1117, 1118). That did not convey idea that book was not "genuine." After knowing that defendant's book is not published by the original publisher or the complainant, witness says he does not know, even now, whether this is a "genuine" Webster's dictionary. So a "gennine" "Webster's" dictionary didn't mean to witness a particular publisher, but merely a particular kind of literary product. "Webster" means a standard book, containing good definitions and spelling (fol. 1122). Hale told him that defendant's book "was not a copy of the original Webster" (fol. 1123). Witness is not interested as to who is publisher (fol. 1124). If he asked for a Webster and got a reprint of the '47 edition "brought up to date by annexes" he would consider his order filled (fols. 1129, 1130).

Entirely satisfied with his bargain after being fully informed that Merriams were not and that the defendant was publisher.

Mr. Hale's activities in prejudicing witnesses illustrated (fols. 1123, 1142, 1143).

8. *Edith Fisher*, Buffalo. Her testimony helps defendant. Didn't know there was more than one publisher (1738). To her the author is the important consideration (fol. 1740). "I didn't think anything about the publisher at all" (fol. 1741).

Understands by a "Webster" a book "written by Webster" (fol. 1753).

"Q. Then, don't you mean by the term 'Webster's Dictionary' which you expect to buy to-day a dictionary based upon the original dictionary written by Noah Webster? A. In a sense it would have to be more than 'based' on it" (fols. 1754, 1755).

She explains that she means by this it must contain more of Webster's work than the word "based" implies (fol. 1757).

9. *Gash*, Brooklyn. His testimony helps the defendant. "Webster's" means a standard dictionary (fol. 1085); doesn't know who published the one he used at school in 1885; it was a small book (fols. 1090, 1096, 1099); so probably published by American Book Company, or Laird & Lee.

"Q. So that if the contents of the dictionary which you bought are, as a matter of fact, taken from and based on the original unabridged dictionary which was edited and compiled by Noah Webster you would be satisfied that it was the dictionary that it claimed to be.

"A. Yes" (fols. 1095, 1096).

And further :

"Q. You bought a Webster's Dictionary because you thought that the rules of spelling laid down by Noah Webster and the definitions given in his original dictionary were correct, is that true?

"A. Yes.

"Q. And you didn't care who the publisher was as long as it met those qualifications?

"A. As long as it met those other qualifications" (fols. 1102, 1103).

This witness's testimony fully sustains the proposition that "Webster's" continues to mean simply Webster's.

10. *Gelhart*, Brooklyn. His testimony helps the defendant. Webster's meant to witness a well known kind of literary product (fol. 1405). Didn't know any publishers by name (1406), and "Webster's" did not mean any particular publisher (1408).

"Q. Does the name 'Webster's' in a dictionary indicate anything more to you than that the contents of that dictionary were originally prepared by some author known as Webster, and are to be considered reliable contents?

"A. I anticipated that I was buying a dictionary by Noah Webster.

" Q. Have you any reason to believe that you did not get a dictionary by Noah Webster ?

" A. I cannot say that I have " (fols. 1408, 1409).

11. *Hughes*, Brooklyn. Age, 49. Webster's means merely a standard authority (1311). Supposed the book he bought (defendant's) was an abridgement of the original Noah Webster's dictionary (fols. 1288, 1296).

And at fols. 1199, 1200, 1201 and 1202 :

" Q. Does the expression ' Webster's Dictionary,' mean to your mind a dictionary containing the Websterian spelling and Websterian definitions by whatever publisher published ? A. I believe that any book called a Webster Dictionary must be connected and based upon Webster's original definitions.

" Q. If you were offered then a dictionary containing the same literary matter with its spelling and definitions based upon the original unabridged dictionary edited and compiled by Noah Webster, would it matter to you who published it ? A. If this book was a reliable edition of the Webster Dictionary, which I knew to be the best authority, regardless of who published it, it would not matter to me."

Supposed only one concern published Webster's dictionaries so that the name Webster's associated in his mind with the original publishers (fol. 1289). Mr. Hale told him Merriam's were only " authorized publishers " (fol. 1302), and that defendant's book was not genuine (fol. 1305). Witness supposed book was so cheap because it was a reprint of an expired copyrighted book. This implies knowledge that it might be published by some other publisher. Very weak implication of preference for complainant as publisher, after careful coaching. When he purchased the book *he did not think about the publisher at all* (fol. 1294).

12. *Hagarty*, Buffalo. This witness helps defendant. Knew Merriam's by name. Admits that careless reading of the advertisement caused witness to infer for a moment she was getting a Merriam Webster (fol. 1766). When she saw the name " Syndicate Publishing Co." on the title page, she knew it was not the Merriam's book (fol. 1770).

13. *Kronvall*, Springfield. Knew Merriam Co. and supposed it was sole publisher of Webster's work (fol. 840). Considered Webster's meant a standard authority (fol. 839). When he complained to the newspaper that he had supposed that he was getting a book published by Merriam, he received his money back (fol. 846).

14. *Lutz*, Brooklyn, helps defendant. Webster's a high authority (fol. 1185). Didn't know name of publisher of Webster's dictionary, but supposed only one existed (fols. 1188, 1189).

"A. I believe that a 'Webster' dictionary must be connected and based upon Webster's original definitions.

"Q. If you were offered then a dictionary containing the same literary matter with its spelling and definitions based upon the original dictionary edited and compiled by Noah Webster, would it matter to you who published it?

"A. If this book was a reliable edition of the Webster Dictionary, which I know to be the best authority, regardless of who published it, it would not matter to me.

"BY MR. HALE:

"Q. You spoke of Webster's original definitions. By that do you mean the definitions contained in the standard current Webster Dictionaries now in general use or the definitions contained in some dictionary published more than fifty years ago?

"A. I believe I mean by that the definitions on which all of the genuine Webster books are based" (fols. 1201, 1202, 1203).

15. *McMahon*, Brooklyn, age 42.

Webster's dictionaries have high reputation (1208). Didn't know who published Webster's (1212), but thought only one firm did (fol. 1223). Book he knew was "Webster's Unabridged" (fol. 1224), i. e., '64 edition. Didn't think about publisher (fol. 1226). That the witness means Webster's product, as distinguished from the maker of the product, is clear, since after knowing all the facts about complainant's

having been the publisher of the Webster's Dictionary he was familiar with, he says that the Court must decide whether defendant's book is or is not a Webster's dictionary (fol. 1243).

16. *Neuberry*. St. Louis. Age 42. Webster's dictionary had a high reputation as an authority (1610). Webster's doesn't imply to witness any particular publisher (1612). Webster means the contents of the book, the witness implies a preference for a dictionary "either edited, revised or published by the same interests that put out the dictionary of thirty years ago" (1620), viz., the '64 edition.

"It is connected in my mind with the original Webster, and the one we learned to respect in school.

"Q. The name Webster in a dictionary suggests to you the author of the dictionary; is that correct?

"A. Well, it would be either author, compiler or the title, I don't know which. It would be just a Webster dictionary" (fols. 1616, 1617).

The dictionary he used in school (fol. 1616), probably was the American Book Company's publication. School books contain mainly, or school children use mainly, the spellings and definitions of standard words, which was all Webster's work.

17. *Neuchterlein* helps defendant. Buffalo. Age 21. He was not deceived, knew just what he was getting, and did not suppose there was any connection between the publisher of his big dictionary at home (Merriams) and defendant's book (fols. 1778, 1779, 1786, 1792, 1795, 1796, 1797, 1798). His case illustrates the questionable methods employed by complainant in procuring testimony. On the preliminary injunction the affidavit prepared for this witness contained statements which he had not made and were not true, and he signed it without reading it, supposing it contained only what he had stated (fols. 1781 to 1784).

18. *Pulsifer*. Springfield. Aged 42. Owns "Webster's International" (826). Knows Merriams by name. Didn't know there were other publishers (832, 833), so supposed defendant's book was Merriam book. He could not have examined title page, which showed defendant as publisher. Careless publisher.

19. *Rogers*, Springfield. Aged 61. Webster's stands for literary fame (781). Knows Merriams by name (782). Title "Webster's" meant Merriam to him (784), though it does not appear that he was ignorant of the existence of other publishers of Webster's dictionaries. He was not cross-examined, but evidently didn't examine title page showing defendant as publisher. Careless purchaser.

20. *Seybel*, New York, client of Mr. Hale's (1010). Knows Merriams by name as publishers "of a dictionary compiled by Dr. Noah L. Webster" (997). As he considers Merriams' books the only "genuine" Webster, he evidently knows there are other publishers. That he means by a "genuine Webster" a book containing Dr. Webster's work and not a publishing house appears from the above and from the fact that, after finding that defendant's book was not published by the Merriams, he didn't know whether it was or was not "a genuine Webster dictionary" (fols. 1001, 1002). Didn't examine book. Had he done so he would not have been deceived (1017). Careless purchaser.

21. *Ida Smack*, Brooklyn. Helps defendant. Knew Webster's dictionary in school (1415), so evidently American Book Co. publication. Webster's means an authority (1415, 1416). Didn't know that more than one concern published Webster's dictionaries (1420).

"Q. Does the name "Webster's" in the title suggest to you the author or the publisher?

"A. Why, the author.

"Q. Did you think about the publisher at all when you purchased the book?

"A. No, I did not (fols. 1443, 1444).

"Q. As between two dictionaries, one of which contains little of that man Webster's work, and another which contains a great deal of that man Webster's work, which would you consider more closely met your requirements of a real Webster's Dictionary?

"A. I would consider that the one that contained a great deal of that man Webster's work to suit my requirements, as I have occasion to look at the book quite often" (fol. 1442).

22. *Times*, Brooklyn, age 45. Knew Webster's dictionary 25 years, but nothing shows who was the publisher of the Webster dictionary he knew. Has no reason to suppose defendant's book is not a "Webster's" dictionary except that Mr. Hale told him it was not a "genuine Webster's dictionary" (1370, 1371). Term "Webster's" dictionary means to witness correct definitions and spelling and he is not interested in the publisher (1374-1376).

23. *Miss Halla Wells*. Helps defendant. Iroquis, N. Y. Regarded "Webster's" dictionary as an authority. Name meant contents of the book (1664-1668). Meant the book she used in her school. Doesn't appear who was the publisher of the Webster's dictionary she knew. Probably American Book Company, or Laird & Lee. Didn't know there was more than one publisher (1667).

"Q. Does not Webster's Dictionary really mean to you a book originally compiled by Noah Webster and brought up to date?

"A. Yes (fol. 1670).

"Q. Is it connected in your mind with any particular publisher?

"A. No.

"Q. You buy the books, then, on the reputation of the original compiler, Noah Webster?

"A. Yes" (fol. 1671).

24. *Miss Burlingham*, New York. Her testimony helps the defendant. "Webster's" means a reliable book (fol. 1248). The effort of counsel unsuccessfully to lead the witness to testify to knowledge of "a series" of Webster dictionaries is enlightening. The witness's reply was, "What do you mean by a series?" (fol. 1254). Witness did not know that there was more than one publisher (fol. 1254).

"Q. Do you understand anything more by the term Webster's Dictionary than a dictionary based upon the unabridged dictionary of the English language of Noah Webster, LL.D. revised and brought up to date in accordance with the most recent eminent English and American authorities?

"A. No" (fols. 1269, 1270).

Defendant's Ordinary Purchasers.

Defendant caused a disinterested canvass of 1230 ordinary persons in twenty cities and towns to be made and the canvassers faithfully reported every answer given, whether favorable or unfavorable.

It shows clearly and overwhelmingly that to the ordinary purchaser, "Webster's" dictionary is a product which he supposes that any publisher may publish and "Webster's" is absolutely disassociated from the idea of origin or ownership.

Defendant sent out five investigators with instructions to examine persons at random without indicating in any way the purpose of the examination, and to write down the result of the examination in each instance immediately after the various interviews. The instructions which were given to these investigators are best set forth in the letter of instructions which was sent to each one before starting out on his work. These letters were in the form found at page 1301 of the Record.

Luther M. Rankin (pp. 1024-1046) examined 101 "average purchasers" in the City of New York. He asked them the following questions :

1. Do you know who is the publisher or who are the publishers of Webster's Dictionaries ?

2. When you hear or see the name " Webster's Dictionary " on a dictionary, does it indicate to you a dictionary published by any particular house or at any particular place ?

3. Do you know any city or cities where any Webster's Dictionaries are published ?

91% answered question 1 in the negative.

Of the remainder, 4 individuals mentioned Funk & Wagnalls.

3 mentioned Merriam.

1 " Syndicate.

1 " Appleton's.

1 " Lippincott.

1 " Collier.

1 " Trow City Directory.

1 " American News Company.

1 " American Book Company.

97% answered question 2 in the negative.

Of the remainder

2 answered question 2. Merriam.

1 " " " Syndicate.

82% answered question 3, in the negative.

Of the remainder

1 answered question 3. Springfield.

14 " " " New York.

2 " " " Philadelphia.

1 " " " Chicago.

Herman Schultz (pp. 1297-1395) examined 316 "average purchasers" in Wilmington, Delaware, Philadelphia, Pa., Trenton, Morristown, Jersey City, Newark and New Brunswick, New Jersey and Brooklyn, New York. He asked in each case the following questions :

" Q. 1. Do you know who is the publisher or who are the publishers of Webster's dictionaries ? "

" Q. 2. When you hear or see the name 'Webster' on a dictionary does it indicate to you a dictionary gotten out by any particular publisher or at any particular place ? "

" Q. 3. Do you know any city or cities where any Webster's dictionaries are published ? "

" Q. 4. Do you know of any series of succeeding rewritings of Webster's dictionaries gotten out by any one publisher ? "

" Q. 5. Who do you think wrote the definitions and fixed the spellings of the words to be found in the Webster's dictionaries which you have known about ? "

" Q. 6. When do you think those definitions were written and that spelling fixed ? "

95% answered question 1 in the negative.

Of the remainder

6 individuals answered Funk & Wagnalls.

1 individual " Lippincott.

1 " " Appleton.

8 individuals " Merriam.

Of the 8 who answered " Merriam "

6 individuals indicated by their answers to other questions that Webster was the author.

7 indicated by their answers to other questions that they thought Webster had written the definitions from forty to one hundred years ago.

5 said that since anyone could publish the dictionary the name "Webster" was not connected in their minds with Merriam or any other publisher.

96% answered question 2 in the negative.

87% answered question 3 in the negative.

97.5% answered question 4 in the negative.

84% of those who ventured any affirmative answer to question 5 indicated that Webster in the title of a dictionary was connected in their minds with the work of Noah Webster.

96% of those who ventured any affirmative answer to question 6 showed by their answers that they regarded Webster's dictionary as an old book.

Thomas I. Skeoch (pp. 1229-1239) examined 340 persons in Boston, Massachusetts. These persons at or about the time of the examination purchased a Webster dictionary from defendant through the Boston Herald (fol. 4928). He asked the same six questions as those set forth above.

100% answered question 1 in the negative.

95% " " 2 in the negative.

95% " " 3 in the negative.

100% " " 4 in the negative.

The great majority answered question 5 by the name "Webster" or "Noah Webster."

The persons examined by Mr. Skeoch answered question 6 in the negative (fol. 4941).

August E. Eckle (pp. 1395-1420) examined 175 persons in Bridgeport, Danbury, Meriden, New Britain, Waterbury and New London, Conn.

He asked the same six questions as are set forth above.

90% answered question 1 in the negative.

Only one answered "Merriam" to question 1.

One individual answered question 1 "Syndicate Publishing Company."

90% answered question 2 in the negative (fol. 5675).

The great majority answered question 3 in the negative.

The rest answered New York, Hartford, Philadelphia, Lancaster and only one Springfield.

100% answered question 4 in the negative.

"The general run" answered question 5 Webster.

The great majority answered question 6 "a long time ago" (fol. 5634).

William M. Gray (pp. 1432-1434) examined 297 persons in Pittsburgh, Pa., Cincinnati, Ohio, Louisville, Ky., and Milwaukee, Wisconsin (fol. 5740). He asked the same six questions as those set forth above.

99% answered question 1 in the negative.

4% answered question 1 Webster.

2% answered question 1 Merriam.

86% answered question 2 in the negative.

87% answered question 3 in the negative.

96% answered question 4 in the negative.

83% of those who ventured an affirmative answer to question 5 indicated that Webster in the title of a dictionary signified the work of Noah or Daniel Webster.

78% of those who ventured an affirmative reply to question 6 indicated by their answers that they thought the definitions, etc., were written a long time ago.

History of Defendant's Publication.

On the 3d day of November, 1904, Louis Klopsch, proprietor of the *Christian Herald*, of New York, N. Y., registered for copyright, in the Copyright Office of the United States, at Washington, D. C. :

"The Crown Dictionary of the English Language, based upon the unabridged dictionary of Noah Webster, LL.D., and revised and brought up to date in accordance with the most eminent English and American authorities" (fol. 649).

At or about that time this book had been prepared and sold to said Louis Klopsch by E. T. Roe of Chicago (fol. 2453).

In the month of July, 1908, the defendant purchased from said Louis Klopsch the plates, copyright and other property connected with said book (fol. 4245). Mr. Wright, President of the Syndicate Publishing Company, who acted for the defendant, expected to publish the book under the name of "Webster," and bought the plates, copyright, etc., only when Mr. Klopsch assured him that the statement upon the title page and in the copyright, namely, that the book was based upon the unabridged dictionary of Noah Webster, was correct (fol. 4382).

After purchasing the book, the defendant inserted a number

of full-page colored and half-tone illustrations (fol. 4354) and began advertising it under the name "Webster's New Illustrated Dictionary," by means of circular letters, advertising in periodicals and advertising in weekly papers. On or about March 20, 1909, the complainant wrote to the defendant asking for a copy of defendant's Webster's New Illustrated Dictionary. Almost by return mail, defendants sent two copies of its dictionary to complainant with its compliments and an offer to give away any information about the books which complainant might desire. Complainant replied by letter dated March 23, 1909, in which it acknowledged receipt of the books and said: "The body of the book looks suspiciously like a book formerly issued by another concern and which, by the way, is in one of our suits; but, of course, we would be wrong in supposing such to be the case. The cuts you have inserted add greatly to the appearance of the book" (fol. 4265).

In its letter, dated March 24, 1909, responding to complainant, defendant said that complainant's suggestion that defendant's book was formerly published by another concern and had been involved in litigation was a great surprise. He wrote, "The book is having a very excellent sale both to the trade and to newspapers who are using it quite largely as a premium." "We would like to know where we stand." We "would be under a great obligation to you for any information that would tend to show we have been dealt with unfairly," by the people who sold us the book.

After a week's delay, complainant answered this letter by one, dated April 2, 1909: "Of course you know that your so-called Webster's New Illustrated Dictionary has been published under a variety of names, and when we wrote, on March 23, we were under the impression that the book under one of its names was included in one of the suits, but we cannot easily verify this and we may be mistaken.

"We shall doubtless have occasion to write you again about your book, but we shall ask nothing but what is proper and reasonable under the court decisions, and you will of course expect to grant no less."

During the remainder of the year 1909 and during the year 1910 no further communication of any kind was received from the complainant. Naturally assuming that complainant had satisfied whatever doubts it may have had (Fol. 4274), defend-

ant continued to sell its dictionary to the book stores, to premium houses and by means of advertisements in weekly and monthly periodicals. At this time defendant's book was listed at \$2.50. Dealers in the book had a right to sell it at whatever price they chose, "but as a rule they sold at the list price" (Fol. 4434).

From time to time during this period defendant caused certain revisions to be made. "In the first edition the revision consisted chiefly of the insertion of new and important words, together with the additions of illustrations, full-page, half tone, two color charts and colored plates" (Fol. 4354). It was customary to make additional changes, consisting of the insertion of new words with "pretty nearly every edition" (Fol. 4357). Prof. Charles Morris, of Philadelphia, Charles Leonard Stuart, of New York, and, to a smaller extent, Dr. Harry Thurston Peck, directed these revisions. They continued until the winter of 1911-12; then the plates were discarded (Fol. 4366).

The year 1910 having passed without further event, the Syndicate Publishing Company adopted in January, 1911, a new plan for the marketing of its books. "By the insertion of full pages and fractional pages of display advertising, in conjunction with coupons and reading notices, in various newspapers in cities and towns of the United States and Canada during a period of from four to six months in each newspaper," defendant succeeded in disposing of large quantities of its dictionaries (fol. 4330). The sales before that time had been "immaterial." When the newspaper distribution plan began the sales became very much larger (fol. 4587).

The keynote of the new plan was its appeal to the newspapers as a means of increasing their circulation. To accomplish this end, innumerable methods of great ingenuity were and are adopted by the circulation departments of newspapers all over the country. The proposition perfected by the defendant and offered to the newspapers was one of the most successful circulation booming and publicity producing schemes which the country has ever known. By means of defendant's plan the "Pittsburg Post" increased its circulation in a few months more than 25 per cent. The essential features of the plan were these: Advertising in its own name, each newspaper featured by full-page display advertisements and by

reading notice a great educational "Presentation." For the purpose of increasing the percentage of accurate knowledge in the community and as an example of the generous public spirit of the editors they offered to "present" to any person in the community who evidenced his interest in the paper by the collection of six coupons from successive editions a copy of a "splendid up-to-date dictionary" usually called by the name of the newspaper itself, for example, "The Post's Dictionary" or "The Herald's Dictionary." The only money required in addition to the coupons was the nominal sum of 98 cents which covered various expense items in connection with the distribution. As the witness Nolan testified, the newspapers were working first, last and all the time for an increase of their own prestige (fol. 7392) as benefactors of the public and relied upon this increase of prestige to increase their circulation. They were advertising themselves, not the dictionaries, and consequently devoted an enormously greater amount of space to their circulation plan than the Syndicate Publishing Company or any other publishing company could have afforded to buy; furthermore, the reading notices always placed in a news section and usually on the front page of the paper gave point to the whole distribution and were of invaluable assistance in the sale of the dictionaries. Some three to four hundred of the newspapers took up the circulation plan. The Syndicate Publishing Company induced them to adopt it by means of the following arguments :

FIRST : "Everybody wants a handy, up-to-date dictionary for every-day use" (fol. 7476).

SECOND : The newspapers would take no risk about the dictionaries themselves, for they would be sold on consignment, and any dictionaries not disposed of at the end of the campaign could be and were returned (fol. 7439).

THIRD : All details of the campaign were worked out by the Syndicate Publishing Company without cost to the newspaper, but subject to its approval. The newspaper thus received, free of charge, the benefit of the experience of the Syndicate Publishing Company on all earlier dictionary campaigns (fol. 7479).

FOURTH : After a few months the Syndicate Publishing

Company was able to point to successes obtained on other newspapers (fol. 7475), and so expert were the officers of the Syndicate Company in adjusting advertising to sales that in some instances (See fols. 7447, 7466, Nolan on the Springfield Union), the profit to the newspaper from the sale of the dictionaries, exclusive even of the great benefits derived from increased circulation, were sufficient to pay for the display advertising.

For many months this newspaper circulation booming program continued with great success. Space worth more than \$2,500,000 was devoted to the plan by the various newspapers. Considering each copy of each newspaper, which contained an advertisement of this dictionary, as a circular, more than 600,000,000 circulars were distributed.

Because of the vast extent of this advertising, because of its great attractiveness, because of the prestige given to each "dictionary campaign" by the newspaper back of it (fol. 7393), because defendant's books satisfied the universal demand for a neatly bound, clearly printed, complete, but easily handled, up-to-date dictionary, and especially because of the very small price asked (48 cents to 98 cents) (fols. 7396, 7456), several hundreds of thousands of these dictionaries were disposed of.

The name or identity of the publisher had absolutely nothing to do with the extent of these sales (fol. 7605). Realizing these facts, secure in its own honest and well-founded conviction that the name or identity of the publisher did not in any way influence the sales, defendant did not give any other publishers of dictionaries a thought, except where others came into the field and tried to get the benefit of the wide interest in dictionaries created by the advertising of defendant's books in the various newspapers.

Having received no communication from the G. & C. Merriam Company for more than two and a half years, defendant surely "had no idea that the Merriam Company claimed or sought to maintain that in the publication of its dictionary defendant in any way infringed complainant's rights" (fol. 4275).

On October 4, 1911, therefore, the following letter came

from the G. & C. Merriam Company like a bolt from a clear sky :

"Your advertisement and sale of a dictionary entitled 'Webster's New Standard Dictionary—Illustrated' has been called to our attention, and we desire to give you formal notice that such advertisement and sale is a plain violation of our rights as the prior and long established publishers of the well known 'Webster's' dictionaries. Your book and advertisements are well calculated to deceive the public and lead them to buy your book in the belief that it is one of our books. This is unfair competition, and we are advised by our counsel that it is actionable. The Courts have so declared, in several cases, and we have other actions pending against other like infringers upon our rights. We shall insist that our rights, as declared by the courts, be respected."

To this letter the Syndicate Publishing Company responded on October 6, 1911, calling attention to the correspondence which had taken place between the Syndicate Publishing Company and the Merriams more than two and one-half years before, and asking the Merriams to point out in what way they claimed the Syndicate Publishing Company was violating Merriam's rights (pages 1071-1074, Record). At the same time it consulted with its attorneys, read for the first time the text of the decision in the Ogilvie case, and although considering the Ogilvie case had been decided upon an erroneous assumption of facts, and furthermore, based upon a different state of facts, nevertheless (fol. 4536), to avoid any controversy they wrote to each and every one of the newspapers handling their dictionaries (fols. 4591, 4733) and asked them to insert in every announcement or advertisement a prominent statement to the effect that their dictionary was not published by the original publishers of Webster's dictionary or by their successors and gave definite and positive instructions to insert the same notice on the title pages of all dictionaries sold by them, whether bound or in process of manufacture (fols. 4313-4316). No reply having been received to the letter of October 6, sent by the Syndicate Pub-

lishing Company to the Merriams, Mr. Swift, one of the officers of the Syndicate Publishing Company, on October 15th, 1911, went to Springfield (fol. 4563), again asked the officers of the Merriam Company in what way they claimed that the Syndicate Publishing Company was infringing the Merriam rights but could obtain no answer except that if defendant wanted peace it must "quit using the name Webster" (fol. 4574). Mr. Swift told the officers of the Merriam Company at this time of the insertion of the so-called cautionary notice in all advertisements and on all title pages, but this apparently was not what the Merriam Company was seeking. Though fully aware that a cautionary notice had been inserted on title pages and in all advertisements and though fully aware that defendant would, for the sake of peace, yield any right except the right to use the name "Webster's" the Merriam Company, without further parley, filed its bill of complaint in this suit on November 8, 1911.

From the time when these cautionary notices were inserted in advertisements and on title pages down to the present day they have been continued without interruption or intermission by the Syndicate Publishing Company. It is submitted that the obvious purpose of complainant is to attempt by subjecting defendant to vexatious and expensive litigation to force defendant to abandon the name "Webster" entirely, and thus use this court of equity indirectly to obtain that which by the decree of the Ogilvie case, complainant was enjoined from even claiming, namely the exclusive right to use the name "Webster" in the title of a dictionary.

Defendant's book is honestly named Webster's New Illustrated Dictionary.

The defendant has "the same right as the Merriam Company to publish and sell a revised edition of Webster's dictionary and to use the name Webster in the title" (149 Fed., at p. 863).

Unless the name "Webster's" in the title of a dictionary has lost its natural descriptive signification as indicative of Webster's authorship, no one would deny the right of anyone to use the name Webster as part of the title of a dictionary,

the distinguishing portion of the contents of which was Webster's work. It was to indicate this precise fact that the complainant used the name Webster as part of the titles of all of its dictionaries down to the publication of the New International in 1909 (see p. 102 of brief). Moreover, Judge WALLACE said in the case of *Black vs. Ehrich*, 44 Fed., 793, that literary matter upon which a copyright has expired is public property, and anyone may use "any part of it or all of it and call it by what name he prefers. Neither the author nor proprietor of a literary work has any property in its name. It is a term of description which serves to identify the work, but any other person can with impunity adopt it and apply it to any other book" (see p. 93 of this brief).

In the preface of his 1828 dictionary Webster laid down sixteen principles which he stated were the basis of his dictionary. One of these principles was that a dictionary should contain accurate etymologies. Another was that definitions should be given in the chronological order in which they attached to the word. These two requirements Webster did not follow in his own abridgements, and they have not been followed in defendant's book. With these exceptions, however, *defendant's book follows all of Webster's sixteen canons of dictionary-making* (fol. 6210).

Defendant's dictionary moreover follows carefully the great Webster rules of spelling, namely, that words in "our," like "labour," "harbour," etc., should be spelled in "or"; that words in "re," like "centre," should be spelled "theater" and "center"; that words like "traveller" with a double "l" should be spelled "traveler" (fols. 3626, 7943). The trivial exceptions to this statement, five in number, have special reasons which are discussed below.

A large part of the introduction to the defendant's dictionary, especially that part relating to the origin and development of the English language, was drawn from Webster's introduction to his own book (fol. 6236).

Complainant's own witness Mawson said that he had minutely examined 10 pages of defendant's book selected at random, and he concluded or admitted that 45 per cent. of the book was "by actual" count "absolutely identical" with "Webster's Dictionary of 1847" (fols. 2170, 2178, 2354-6).

Dr. Peck testified that from his count of 200 out of 800

pages of defendant's dictionary, the words used in defining the titles or terms which were defined also in Webster's were 67.6 per cent. identical with the words used by Webster in defining those titles or terms (fol. 7822).

In the 200 pages counted by Dr. Peck the total number of titles is 6932. Of this number 5651 appear and are defined both in Webster's 1847 and in defendant's book. In these same 200 pages there are 1281 words defined which do not appear at all in the Webster 1847 (fol. 7947).

Assuming that the same proportion is maintained throughout the book, its entire contents may be analyzed as follows: It defines approximately 30,000 words. Of this number approximately 5,550, or about 18.5%, are new words, which were not given or defined in the 1847 Webster. The balance of 81.5%, or 24,450 words, are the only ones whose definitions could possibly be taken from Webster. 67.6% of the words used in defining this residual group of words are almost identical with the words used in the corresponding Webster's definitions:

Summarized Analysis.

	Defendant's Estimate based on count of 200 pages.	Complainant's Estimate based on count of 10 pages.
Percentage of new words not defined by Webster.....	18.5%	18.5%
Percentage of definitions revised.	26.5%	36.5%
Percentage of definitions kept practically unchanged.....	55 %	45 %
	<hr/> 100 %	<hr/> 100 %

The definitions which have been revised are mainly technical and scientific terms. Since Webster himself was not a scientific man, his definitions of these words were often incorrect; and even if they had been absolutely correct in the light of scientific learning as it had progressed in his day, they would nevertheless need great revision 80 years later to conform to new discoveries, inventions, etc. (fols. 7833-36).

The editor of defendant's book, E. T. Roe, who is one of

the editors employed by Laird & Lee in the preparation of its series of Webster's Dictionaries (fol. 2455), and who compiled "Webster's Modern Dictionary," which was awarded a gold medal and diploma at the Lewis & Clark Centennial Exposition (fol. 7322), has stated that the description which he placed on the title page of defendant's dictionary, to the effect that it was "based on the unabridged dictionary of Noah Webster, LL.D., revised and brought up to date," etc., is correct, and that a comparison of the book with the 1848 edition of Webster's Unabridged Dictionary will show that it is nearer in all essentials, including orthography, pronunciation and definitions, than are any of the so-called Webster's Dictionaries now being published by the G. & C. Merriam Company or its ally, the American Book Company (fol. 7627).

Dr. Peck, for twenty-two years a Professor at Columbia University, holder of many honorary degrees and the author of numerous works on philology and lexicography, testified as follows :

" Q. From your entire studies in connection with these two books of the defendant, and in connection with your examination of the 1828, 1847 and 1864 Webster's Dictionary, what would you say about the two books of the defendant as to whether or not they are properly called Webster's Dictionaries? A. My opinion is that both of these books contain so large an amount of actual material taken from the Webster Dictionary of 1828, 1847 and 1864, and for the rest following so closely the scheme of the dictionary outlined by Webster himself that it is entirely proper to speak of each or both as Webster's, as the material is Webster's and the scheme is Webster's."

" Q. Do you express it as your deliberate opinion that the Webster's New Standard Dictionary of the Syndicate Publishing Company conforms to all the principles laid down by Noah Webster in his introduction, to which you have referred? A. All, so far as is possible in a condensed dictionary as opposed to an unabridged " (fol. 6318).

" The book certainly conforms to one of Webster's most cherished views or principles that the vocabulary

should be fresh and should be new, and that it should even include words whose place in the language is still undetermined so long as they are in use." * * * "I was particularly struck by the vocabulary of the 'Webster's New Illustrated' in that it contained so many words of such recent origin" (fol. 6319).

"No person with a fair open mind could read the continual repetition" of the Webster 1847 which you find in defendant's book, "paragraph after paragraph, and page after page, without being absolutely sure that it came from the Webster's 1847" (fol. 6431). That defendant's book "came from Webster is absolutely certain in my mind. I would be willing to assert that and swear to it. It is a demonstration; it is like 2 and 2 are 4" (fol. 6434).

Defendant's books are properly termed Webster's Dictionary "because they retain, so far as Webster would himself have retained in an abridgement the principles that he set forth and that were vital." * * * In other words, "if you get the Webster feeling and you see that the thing is done in the Webster manner, you don't cavil and carp as a rule at a particular illustration you may find or definition or something, but you take the book as a whole to see whether it is constructed on the Websterian basis" (fol. 6274).

Professor Rolfe of the University of Pennsylvania, formerly connected with the faculty of Harvard and also of Cornell and President of both the American Philological Association and of the Classical Association of the United States (fol. 7955), whom Judge HAND referred to as a "concededly fair witness" (fol. 8256), said that he had spent a week in examining with very great care Dr. Peck's markings upon which defendant's estimate of percentages was based (fol. 7962) and that his conclusion was that "they were carried out with extreme conscientiousness" (fol. 7963).

On cross-examination, Professor Rolfe testified as follows :

"Q. You have stated that in your opinion you thought that, upon the whole, defendant's dictionary was properly called Webster's Dictionary. Please am-

plify that answer and state how and why you entertain that opinion? A. Well, first, because I was satisfied in my own mind that it contained at least fifty per cent. of material taken directly from Webster's Dictionary of 1847."

"Q. And that was based on your verification of Professor Peck's markings? A. Yes, that was based on that."

"Q. What else? A. And also some other things that occurred to me. Of course, we do not go absolutely hard and fast by red marks and so on, but as you work through a thing of that kind you get an impression. * * * And when I got through my impression was a little stronger than the percentages would indicate, that is, as to the propriety of the use of the term" (fols. 8059 to 8060).

It is defendant's belief and contention that the foregoing facts and opinions show ample justification for its use of the name "Webster's" as part of the title of its dictionary. None of the essential facts stated above are rebutted by complainant's testimony. In the face of these facts, all of complainant's elaborate statistics and proofs are irrelevant and immaterial. It is solely for the purpose of showing this irrelevancy and immateriality that the following discussion is entered upon.

Complainant has attacked defendant's book by means of one witness, C. O. Sylvester Mawson. This witness was an unimportant Englishman employed in a minor capacity on the editorial staff of complainant (fol. 7658). His testimony is filled with prejudiced and often extraordinarily inaccurate statements. In spite of his prejudice, however, he did not attempt to deny Dr. Peck's statement that the introductory portions of defendant's book are taken directly from Webster's; nor that defendant's book follows all the general lexicographical requirements set forth by Dr. Webster in his own preface. Mr.

Mawson advanced the following facts as arguments tending to show that defendant's book is not entitled to bear the name Webster. Solely for the sake of convenience, the order in which Mr. Mawson advanced these arguments will be followed in answering them :

FIRST. Mr. Mawson attacked defendant's book because it contained phrases marked as nouns, for example, "Adam's ale," "Improper fraction," "Magic lantern," etc. (fol. 2092). He stated that neither Webster's Dictionary of 1847 or any other edition followed that practice (fol. 2093). The fact is that this was the precise practice followed in many instances by the 1847 edition of Webster, so that Mr. Mawson either is ignorant or willfully misrepresented the fact. A long list of such words like "Star fish," "Naval officer," "Parish clock," etc., being non-hyphenated two or three word phrases given in the Webster 1847 and designated as nouns will be found at folio 7671 *et seq.*

SECOND. Mr. Mawson attacked defendant's book on the ground that 75 out of 30,000 words were spelled in what he called an English form rather than in an American form (fol. 2094).

It should be noted that complainant has departed from Noah Webster's spelling whenever it chose to do so (fol. 2250), and the editors of defendant's book are surely entitled to the same privilege.

As a further answer to this criticism by Mr. Mawson, it should be noted that defendant's book follows the three great Webster rules of spelling ; namely, that words in "our" like "labour, harbour," etc. (folio 6326 and folio 7843) should be spelled with "or," as "labor, harbor ;" that words in "re" like "theatre, centre," etc., should be spelled with "er" as "theater and center ;" that words like "traveller" with a double "l" should be spelled "traveler" with a single "l." Of the 75 words cited by Mawson the only word in "our" is "dolour" and the only words in "re" are "zaffre, ochre, maugre and accoutre." For those words Webster gives both forms, that is, both "er" and "re" (See folios 7688, 7723, 7725 and 7744), in each case, except the latter, where defendant's book gives both forms. In the words "accoutre," "ochre" and "maugre" the change to "er" is not favored because it would change the pronunciation.

Practically all of the words included in this list of Mawson's are spelled by the best authorities in the United States, as well as in England, in both ways, and it is purely a matter of individual taste which form shall be used. In many other cases, moreover, the Webster 1847 form stands alone, and is no longer if ever preferred by the best authorities. The witness Mawson was again ignorant when he stated that the form which he gives from the 1847 Webster, is the accepted American form. Many of these forms are actually rejected by such authorities as the "Standard Dictionary," the "Century Dictionary" and "Worcester," see pages 1922 to 1936.

Included in this list are words given in defendant's book in the correct French form, like "aide-de-camp, gavotte," etc. (folio 7748), but which are given in the 1847 Webster in a curious anglicized form like "aid-de-camp, gavot," etc.; also included in the list are words like "cyclopædia" (folio 7702), "banian" (folio 7692), etc., for which both defendant's book and Webster give both forms, indicating that each approves of each; also included in the list are words like "boulder" (folio 7693), "brazier" (folio 7694), etc., in each of which cases defendant's form is preferred by all English and American dictionaries except Webster, and in which Webster gives both forms; also included in the list is the word "cotillion" (folios 7945, 7699) in which the Webster 1847 spelling of "cotillon" given by Mawson as the preferred Webster form has been rejected by the editors of Merriam's latest book, "The New International." Also included in the list are words like "instil," "appal," etc. (folio 7750). These words follow the principle which Webster claimed to follow, and are given in defendant's book with one "l," that is, in the simpler form; also included in this list are words like "detector" and "abetter," which Webster through mistaken ideas as to etymology spelled "detecter" and "abettor" (folios 7746, 7755).

There remain some 13 spellings out of the 75 which do not fall within some one of the above rules. They are words like "carburetted," "glycerine," etc., which Webster spelled "carbureted" and "glycerin," which are perhaps oversights; surely matters of taste and in any event entirely trivial.

THIRD. Mr. Mawson further attacked defendant's book on

the ground of certain miscellaneous mistakes. From the amount of space devoted in Mawson's testimony and in the cross-examination of the defendant's experts to miscellaneous errors which are included in this head, it might be supposed that defendant's book was hopelessly inaccurate. The fact is, however, as will appear from the following summary, that these errors are nearly all of small importance, are very few in number, and that errors of a similar kind are found in all dictionaries.

"In the 1847 Webster, for example, they offered \$1.00 for every misprint or mistake. Caleb Cushing sent them in a list of over 40,000" (folio 6680). Some of the errors in the 1847 Webster escaped even Caleb Cushing and survived through all revisions of the 1847 edition. Some of them will be found on page 1491 of the record. Errors of a similar kind (fol. 2231) in "Webster's Condensed Dictionary," published and sold by the Merriams to-day, will be found at pages 571 to 577 of the record.

Dr. Worcester said in the preface to his dictionary that "no amount of labor, research and care can render such a work free from errors and defects" (folio 7784). In the preface of the 1883 edition of Ogilvie's Imperial Dictionary, it is stated that: "Notwithstanding the expenditure of much care and labor, it is not to be supposed that the present work can be perfect, or even free from various errors and defects."

After two months of labor Mawson was able to discover in defendant's book the following defects:

9 words given out of strict alphabetical order (fols. 2124, 2127).

6 mixed definitions (fol. 2130).

11 miscellaneous alleged errors (fol. 2136).

19 definitions alleged to be English in character (fol. 2139, *et seq.*). (It was quite Websterian to give words with definitions of English character; see, for example, long list of such definitions at pages 1942 to 1946 of the record. These words and definitions are taken from Webster 1847.)

6 cross references to words not given, and

25 words used in definitions not themselves defined.

(16 of these words are unusual; as, grass-cloth, couch-grass, after-grass, lycopodium, zygote, etc., which will be found in few if any abridged dictionaries, fol. 2157.)

FOURTH. That part of Mawson's testimony which complainant apparently lays most stress on in attempting to convince the court that defendant's book is not entitled to bear the name "Webster" is the part relating to Price's British Empire Dictionary. Mawson testified that 98 or 99 per cent. of defendant's book was identical with the British Empire Dictionary. He testified further that the British Empire Dictionary contained some 7,000 words which defendant's book did not contain, and that defendant's book contained some hundreds of new words not given in Price (fol. 2074). He testified further that some hundreds of other words were spelled in defendant's book in the so-called Webster form and spelled in the British Empire Dictionary in another form (fol. 2174 and Comp. Exhibit B. E. D. marked). All this is immaterial. If defendant's book had been shown to be 100 per cent. identical with said British Empire Dictionary this would raise no other or further question than that which is raised by the fact that defendant's book was for a time sold by Louis Klopsch under the title "Crown Dictionary." The British Empire Dictionary itself contains such a large percentage of Webster's definitions that it could with propriety have been called a "Webster's English Dictionary", and according to the testimony of the witness Mawson, defendant's book conforms more closely to the principles laid down by Webster than does the British Empire Dictionary itself. This is especially so in the spelling of words ending in "er" and "or", like "theater" and "color" as well as words like "traveler", "symbolize", etc. (fol. 2127). Defendant's book, moreover, contains an introduction taken from Webster. It is, therefore, more entitled to bear as part of its name the word "Webster" than was even the British Empire Dictionary.

FIFTH. Complainant's next assault consisted of an attempt to throw doubt upon the reliability of defendant's method of ascertaining origin by comparison and count of identities. Without showing any pages marked or giving any details, the witness Mawson testified that 70% of defendant's book was identical with Ogilvie's Imperial Dictionary. This is not astonishing, inasmuch as Ogilvie's Imperial Dictionary was itself made up from and described by its editor as based upon the "Great Unabridged Dictionary

of Noah Webster". Defendant has offered in evidence a copy of the first edition of Ogilvie's Imperial Dictionary (fol. 7814) which states upon its title page that it is "on the basis of Webster's English Dictionary" (fol. 7815), and at page 2 of the preface is the language "Webster's Dictionary, which forms the basis of the present work" (fol. 7818). Mawson's testimony was based upon the 1883 edition of Ogilvie's Imperial, which was merely an enlargement of the original Ogilvie (fol. 7820). The extraordinary identity between the 1883 Ogilvie and Webster 1847 will appear immediately upon an inspection of the two books. The definitions, for example, of the words "pneumonia" *et seq.*, are practically 100 per cent. identical. The same is true of the definitions picked at random for the words, "lash, lass, pock, pocket, pocket book, poem, poet, poetaster." The 1883 Ogilvie even goes so far as to retain unchanged most of Webster's encyclopedic quotations, and this is particularly noticeable in the definitions of the words, "lash" and "poet."

The definition of the verb transitive "lash" given by the 1847 Webster is as follows :

"1. To strike with a lash or anything pliant ; to whip or scourge.

We lash the pupil and defraud the ward—Dryden.

2. To throw up with a sudden jerk.

He falls ; and lashing up his heels, his rider throws—Dryden.

3. To beat, as with something loose ; to dash against.

And big waves lash the frightened shores—Prior.

4. To tie or bind with a rope or cord ; to secure or fasten by a string ; as, to lash anything to a mast or to a yard ; to lash a trunk on a coach.

5. To satirize ; to censure with severity ; as, to lash vice."

The definition of this word given in the 1883 edition of Ogilvie's Imperial Dictionary is exactly identical, including all literary quotations with that given above from the 1847 Webster. .

The definition of the word "poet" given by the 1847 Webster is as follows :

"1. The author of a poem ; the inventor or maker of a metrical composition."

A poet is a maker as the word signifies ; and he who cannot make, that is, invent, hath his name for nothing. Dryden.

"2. One skilled in making poetry or who has a particular genius for metrical composition ; one distinguished for poetic talents."

The definition of this word given in the 1883 edition of Ogilvie's Imperial Dictionary is exactly identical including the literary quotation with that given above from the 1847 Webster. The Ogilvie dictionary adds another definition "a person endowed with high imaginative powers" and also two quotations from Shakespeare and Tennyson.

If any further proof of the solid Webster foundation of Ogilvie's Imperial Dictionary were needed, it can be found in the life of John Ogilvie, given in the Dictionary of National Biography, edited by Sir Leslie Stephen, in which it is stated that "Messrs. Blackie engaged Ogilvie in 1838 to prepare an English Webster's Dictionary, the result being the Imperial Dictionary of the English language" (fol. 7810). It is an elementary maxim that things equal to the same thing are equal to each other. Since Ogilvie is based on Webster, identity between defendant's book and Ogilvie can prove nothing but basis of defendant's book in Webster.

SIXTH. Complainant continued its assault upon the reliability of defendant's method of ascertaining origin by comparison and count of identities, by offering certain pages from Cassell's English Dictionary marked to show identities between that book and defendant's book. The witness Mawson testified, basing his answer on the identities marked in the pages from Cassell, that defendant's book was 61 per cent. like Cassell (fol. 2174). He admitted on cross-examination, however, that Webster's Dictionary was an accepted authority in England (fols. 2221-2317), and that some edition of Webster had been consulted in the making of Cassell (fols. 2337 and 2342). It is not extraordinary, therefore, that there

should be identities between defendant's book and Cassell, in view of the fact that Webster was used in the preparation of each.

Mawson apparently considered that Chambers' Twentieth Century Dictionary was in the same class with Ogilvie and Cassell. He said (fol. 2174), basing his statement on certain pages offered in evidence with colored ink markings, that defendant's book was 49 per cent. identical with Chambers'. For some reason or other, Mr. Mawson again chose to misrepresent the facts. From an actual count of the words underlined by him to show similarities between defendant's book and Chambers', it appears that these words constitute only a little over 40 per cent. of the pages taken from the defendant's book (fol. 8090). Moreover, this book was written in 1901 (fol. 2316), whereas Price was written in 1899 (fol. 2308). He further admitted, with respect to this book as well as the Cassell book, that some edition of Webster's dictionary had been consulted in its making (fols. 2337, 2342). Probably Webster was less consulted in the preparation of Chambers' than in the preparation of Cassell, because the percentage of identities between defendant's book and Chambers' is so markedly less than that found between the 1909 Cassell book and defendant's dictionary.

SEVENTH. Continuing his assault upon defendant's method of proving origin, Mawson offered two large parallel-column pages containing parts of columns cut from the following dictionaries: Worcester, Annandale, Stormonth, Nuttall, Student's Standard, and Concise Oxford. Mr. Mawson failed to qualify as an expert. He, nevertheless, stated, without any authority except his own word, that "none of these dictionaries are based upon Webster's Unabridged Dictionary" (fol. 2196). The first inference which can be drawn from this is that *Ogilvie*, *Cassell* and *Chambers*, which preceded the second group, are distinguishable from the second group on the ground that they are in fact based on *Webster*. Moreover, one of the best examples of Mr. Mawson's carelessness, inaccuracy and inexpertness is found in his statement that no one of the second group is based on Webster.

It appears from the comparison of the matter taken by Mawson from Nuttall's dictionary that the definitions in the

Nuttall column on page 30 are 100 per cent. identical with the definitions for the corresponding words in "Webster, 1847" (fol. 8106), and that in the column appearing on page 31 under the name "Nuttall," with the exception of sixteen words inserted by Nuttall for the purpose of added meanings not given by Webster, the definitions are absolutely identical with the corresponding definitions in "Webster, 1847" (fol. 8108).

Annandale's Concise Dictionary is published by Blackie & Son, the same publishers as those who employed John Ogilvie to make the Imperial Dictionary. Furthermore, Annandale bears conspicuously upon its title page the words "Based on Ogilvie's Imperial Dictionary" (see title page of Complainant's Exhibit "Annandale's Concise Dictionary"). Ogilvie's Imperial Dictionary as is set forth above, was merely a revision of Webster and spoken of as an "English Webster's English Dictionary." Annandale, therefore, being based on Ogilvie, is of course, ultimately based on Webster. Nevertheless complainant's witness Mawson included "Annandale" among the six dictionaries which he alleged "are not based on Webster."

Probably Worcester in a strict sense did not base his book on Webster. Undoubtedly his principle of spelling and orthoepy were in some respects radically different from those of Webster. All of his early lexicographical training, however, was in company with Webster and his first dictionary was written in conjunction with Webster (fols. 1542, 1573), so that he fell naturally into the Webster manner of defining words. It is not to be marveled at therefore, if a large percentage of identity resulted between Worcester's definitions and Webster's definitions.

Mr. Mawson was particularly careless in counting the alleged identities (fol. 2194) between the six books named and defendant's book (fols. 8093-8101).

	Mawson's count.	Correct count.
" Worcester's.....	44%	37 %
Annandale's Concise.....	46%	44.5%
Stormonth's	39%	32.5%
Nuttall's	39%	35.5%
Student's Standard.....	32%	21.5%
Concise Oxford	28%	17.9%."

Mr. Mawson gave as the average identity between these six books and defendant's book, thirty-eight per cent. (fol. 2194). Giving him the benefit of every doubt, and assuming that his markings are correct, the actual percentage of identity between these dictionaries and defendant's dictionary is 31.5 per cent. (fol. 8103).

The matter from these six dictionaries and the alleged percentages of identity between them and defendant's book were intended to prove that there is a very large percentage of identical expression running through all dictionaries, due, first, to unavailability; second, to the use of synonyms; third, to coincidences; and, fourth, to common sources (fol. 2181). Defendant is ready to admit that if two dictionaries are taken from Webster there will be a large percentage of identity between them. *Apparently, this is the cause of a large proportion of the percentages of identity shown between the six books named and defendant's book.* Of course, the witness Mawson did not mean this. He stated erroneously it seems, that none of these books is based on Webster, and he wished to make it appear that identities between defendant's book and Webster, as well as identities between defendant's book and these other books, were due to a common source in some such ancient dictionary as Johnson or Bailey. This pretty theory is at once refuted by pointing out the falsity of the statement that none of these books is based on Webster. The fact is that only one of these books, namely, the Concise Oxford, is really an independent production. Therefore if we leave out identities due to a common source in Webster, it would appear that approximately 18 per cent. is the correct percentage of identity which can be ascribed to unavailability, coincidence and the use of synonyms.

This testimony therefore confirms defendant in its contention regarding the Websterian character, contents and origin of its book, for it appears that defendant's book is least similar to the Oxford Dictionary, which is the only absolutely new and independent dictionary—most similar to the Ogilvie Imperial which is the dictionary

most closely related to Webster—and similar to the other dictionaries in direct proportion to the closeness of their relationship to Webster.

EIGHTH. Mr. Mawson offers one page cut from Johnson with the corresponding pages from Webster, 1847, and from defendant's dictionary. Of course one page out of 1000 proves nothing. He states (fol. 2200) that between 49 and 50 per cent. of the part of defendant's dictionary, given on page 32 of his exhibit, is traceable to Johnson. A correct count of the identities marked shows them to be 39.5 per cent. instead of 50 per cent. (fol. 8160), and a cursory comparison of defendant's book with the Johnson Dictionary offered in evidence by complainant, will show that even this percentage, is many times greater than the average percentage of identity between the two books. For example, page 39 of defendant's book contains by actual count only a little over 12 per cent. of matter traceable to Johnson.

In any event, the single page offered by complainant is in no way inconsistent with an origin for defendant's book in Webster inasmuch as every word which is marked in defendant's dictionary (on page 32 of Mawson's exhibit) as being identical with Johnson, is also included in the definitions appearing on the corresponding page cut from Webster. In addition, there are a number of identities between this page of Webster and defendant's book which cannot be found in Johnson (fol. 8162). The conclusion is inevitable that whatever matter from Johnson survives in defendant's book has come to defendant's book through the channel of Webster's dictionary.

Much of Johnson was rejected by Webster, but such Johnson matter as was adopted by Webster was adopted as Webster's own. By incorporating it in his book, Webster gave said matter his approval and sanctioned the use of his own name in connection with it. After such an adoption by Webster, and especially in America where Johnson was and is comparatively unknown, this matter is clearly most appropriately called by the name of Webster.

Webster in the Courts.

1890. Merriam vs. Hollaway, 43 Fed., 459. Demurrer to a bill brought to restrain the defendant from using advertising devices which the complainant had been using; to restrain the use of the date 1890 on the title page of defendant's book, which was a reprint of the 1847 edition; to restrain the use by the defendants of the term "Webster's Dictionary," on such reprint. Demurrer overruled. The Court said, as to complainant's claim to an exclusive right in the name "Webster's," that it was "all nonsense."

No "secondary meaning" was claimed to exist.

1891. Merriam vs. Famous Co., 47 Fed., 411. On demurrer. Defendant was selling a photo-lithographed copy of the edition of 1847, under the title "Webster's Dictionary." Complainant alleged that certain persons had been induced to purchase the reprint thinking it was the same book the Merriam's were then publishing. Held, that the Merriam's had no right to exclusive use of the name Webster's; nor to an exclusive right to the form or size of the book; that as the defendants had represented by their advertisements that their edition was a copy of the book that the Merriam's had sold from \$12 to \$15, whereas it was the edition of 1847, which had been out of print for a long time, and the edition of 1864 was the only one on the market, an injunction would issue.

No secondary meaning was claimed to exist.

1892. Merriam vs. Texas Siftings Co., 49 Fed., 944. Suit to enjoin the use of date 1890 on the title page of defendant's book, a reprint of the 1847 edition; to prevent the defendant from advertising the reprint as the "latest edition, etc., old price \$8.00," and the fact that the new price of \$1 was made possible by improvements in machinery. Held that the Merriams were not entitled to an exclusive use of the name Webster's but they were entitled to an injunction against the circulation of misleading advertisements; that there was no characteristic of a trade mark in the words "Webster's Dictionary" or in the form or size of the book used by the Merriams.

No secondary meaning was claimed to exist.

NOTE. The holding that the Merriams had no exclusive right in the word Webster's was approved by the Supreme Court of the United States specifically at 163 U. S., 169, in citing the two above mentioned decisions.

1904. Merriam vs. Straus, 136 Fed., 477, before WALLACE, J. Argument of a plea. Action for unfair competition. Plea was overruled and defendants were directed to answer. Judge WALLACE said that the exhibits "suggest grave doubts whether the books sold by the defendants, notwithstanding the use of the word 'Webster's' thereon are not sufficiently distinguished from those published by the complainants to repel the charge of unfair competition. * * * It is proper, however, to say that the bill is in part an attempt to protect the literary product in dictionaries which became *publici juris* upon the expiration of the copyright. This attempt must prove futile. But there may be a commercial property in books as well as a literary property, and when a publisher has imparted to his books peculiar characteristics which enable the public to distinguish them from other books embodying the same literary property, and to recognize them as his particular product, there is no reason why the principles which interdict unfair competition in trade should not afford him protection against the copying of the characteristics by rivals. So far as the bill proceeds upon this theory it presents a meritorious case."

In this case the Merriams for the first time alleged that "Webster's" in the titles of dictionaries, had acquired a secondary meaning.

1904. Ogilvie vs. Merriam, 149 Fed., 858. Ogilvie as publisher of a thoroughly revised and much enlarged Webster's Dictionary brought suit in 1904 in Boston against the Merriam Co. to enjoin them from sending out threatening letters and circulars claiming they had the exclusive right to use of the name Webster's upon dictionaries, saying to proposed purchasers of Ogilvie's book which was sold under the name "Webster's Imperial Dictionary," that if the trade pur-

chased the book they would sue them all "along the line" (Bill, Ogilvie suit).

This suit was tried before Judge COLT. He granted an injunction forbidding the Merriams "from sending out circulars to the effect that they have an exclusive right to the use of the name Webster's in the title of a dictionary" (149 Fed., 864). In this case, the Merriams contended again, and for the fifth time, that they had an exclusive right to the name "Webster's." The remarkable thing about the suit is that Judge COLT with one hand forbade them from making the claim that they had exclusive right to the name Webster's and quoted with approval Mr. Justice MILLER's opinion (43 Fed., 450) "that the contention that complainants have any special property in 'Webster's Dictionary' is all nonsense," with the other hand he granted them a secondary meaning, for he said, in his statement of the evidence (p. 860):

(a) "The Merriam Company and its predecessors * * * acquired all the rights in Webster's Dictionary from the heirs of Noah Webster previous to 1847." (He was mistaken. The fact is they did not acquire any rights except as licensees of the Webster copyrights, and there were other licensees who enjoyed similar rights. See contracts in evidence in this suit, fol. 3200). Undoubtedly much light has been thrown on this subject since the date of Judge COLT's decision.

(b) This, viz., Webster's Dictionary, "is the generic name by which this book has always been known and described. It further appears from the evidence *that from 1847 to 1889* the Merriams were the *SOLE publishers* of Webster's Dictionaries, and that in 1889 the name 'Webster,' as applied to dictionaries, had acquired a secondary meaning, and indicated to the public the dictionaries published and sold by the Merriam Company. It further appears that since the expiration of the Merriam copyright in Webster's Unabridged Dictionary in 1889, various editions of Webster's Dictionary have been published and sold by other publishers; but notwithstanding this circumstance, it is shown by a preponderance of evidence that the name 'Webster' still indicates to the public the dictionaries published and sold by the Merriam Company."

Apparently, Judge COLT did not have all of the facts before him, for, the fact is that, beyond question, instead of Merriam's being the sole publishers of Webster's dictionaries from

1847 to 1889 there were fifteen other people and probably more who published Webster's dictionaries during that time (See appendix, p. 166).

He adds: "When the word Webster's as applied to dictionaries has once become dedicated to the public it is not again subject to exclusive appropriation as a trade-mark or trade name, nor can the public be deprived of its use on the ground of unfair competition" (p. 863).

The final result of this case was an injunction for bidding the Merriams to continue to claim the sole right to the name Webster's and forbidding Ogilvie "from the use of circulars and advertisements which are misleading and deceptive," the Court specifically holding that his book, as it bore on the back of cover the words "George W. Ogilvie" and on the title page the words "George W. Ogilvie, Publisher," Ogilvie had done all which the law requires to distinguish his book from the dictionaries published by the Merriams, including Webster's International Dictionary (p. 864).

1908. The Merriams appealed the Ogilvie case to the Circuit Court of Appeals, 159 Fed., 638. Ogilvie did not appeal, and in his brief as appellee said he was entirely content with the decision of the lower court. Accordingly, it was held that under the doctrine of *Singer vs. June*, 163 U. S., 169, while the name Webster had become a public name, the right to use it must be subject to a duty similar to that defined in the *Singer* case, and on that analogy the Court held: "If the title page of the Ogilvie dictionaries had contained, for instance, the words 'Webster's Dictionary, published by George W. Ogilvie,' with other expressions correctly indicating the identity of the publication, the Merriam Company would have no just cause for complaint. But such is not the case" (p. 641). Held, further, that the designation of each dealer who is using an article upon which patent or trade-mark has expired "must be efficient and ample under the circumstances of a given situation" (p. 643).

The net result of this appeal was that the question of secondary meaning was practically overlooked, and the rule was laid down in accordance with the *Singer* case, that it was the duty of anyone publishing a Webster's dictionary, including the Merriams, to mark his particular brand of the books so that there would not be confusion.

The Merriams then filed a petition for a rehearing which was denied, and later petitioned the Supreme Court of the United States for *certiorari*, which was denied May 8, 1908 (See 190 Fed., 931).

1909. Again the Merriams appealed (170 Fed., 167), being dissatisfied because (1) the decree ordered did not correspond to the Singer case rule; (2) no accounting was ordered. The Court held, "The Merriam Co. commenced with and insisted on the proposition that it was entitled to the *exclusive use of the name Webster* (p. 171). * * * The fundamental issue raised by the Merriam Co. was its claim to the *exclusive right to the use of the word in controversy*," and the Court decided, that this claim of the Merriams' in conjunction with its threatening letters constituted a tort and debarred them from an accounting.

The Circuit Court of Appeals further directed that Ogilvie and his successors should mark their books with this notice: "This dictionary is not published by the original publishers of Webster's Dictionary or by their successors."

The fact that the Court found that Ogilvie's acts were more misleading than it had at first considered them did not change or increase the rights of the Merriams in the name Webster. Those rights remained constant, viz., a right enjoyed by them with the rest of the world to use the public word "Webster."

The final form of the decree entered is given at 190 Fed., 931.

The situation, therefore, at the end of the Ogilvie case was that Judge COLT had granted a secondary meaning on an erroneous finding of fact which finding of fact Ogilvie was content with, and did not question on appeal; that the Merriams had been judged to be a tortfeasor for persistently claiming the sole right to the name Webster's, and an accounting of profits had been refused them, but the court considered the acts of Ogilvie sufficiently misleading to necessitate particular and unusual care on his part in making clear that his goods were his, not those of some one else.

We now turn to the third chapter in the Merriam's campaign in which, utterly disregarding these various injunctions forbidding them to claim this exclusive right, they again start out in quest of this monopoly.

1908. In December, 1908, the Merriams brought suit in the Sixth Circuit against one, Saalfeld, who had bought out Ogilvie's business, and elaborately set up their claims to the sole use of the name Webster's on the following grounds: (a) The great renown of Webster; (b) his great learning; (c) the great learning of his editors and assistants; (d) the skill and care of the Merriam Company in typesetting, printing, proof-reading, etc., so that everyone considered "that all dictionaries bearing the title Webster's Dictionary * * * were * * * published by * * * Merriam, and none other * * * and became a guarantee * * * that the same * * * had been prepared * * * by Merriam * * * and by none other * * * and was known by all people * * * as the book * * * of Merriam, and theirs exclusively" (Bill, par. 5).

This case was tried before Judge TAYLER, who found for the defendant. The hearing before Judge TAYLER was on the affidavits submitted for preliminary injunction and the record in the Ogilvie suit was stipulated into the record in this action. He held that the case was concluded by the decree in the Ogilvie case because Saalfeld was in privity with Ogilvie.

1911. An appeal was then taken by the Merriams (190 Fed., 927) and the Circuit Court of Appeals then reversed Judge TAYLER and granted an injunction against Saalfeld on the ground that he had not, as Ogilvie's successor and privy, observed the limitations laid down in the injunction entered against Ogilvie.

1912. Still the Merriams were not satisfied and in 1912 they demanded and obtained a rehearing of this case demanding an accounting, which the Circuit Court of Appeals thereafter granted to a limited extent after December, 1909 (198 Fed., 369).

The decision of the Court on this appeal lays down the principle on which the complainant is proceeding in the case at bar, namely, that the Singer case enjoins upon one selling a copyrighted article, after the franchise has expired, the duty of putting his own name on his goods, so that the public can

by reasonable inspection know whether it is getting the goods of the original maker or not. Nothing in the Singer case or in this case holds that such a person must insert a cautionary notice.

Ogilvie committed serious overt acts of unfair competition which had the result of creating confusion in the public mind. The Court of Appeals said that his purpose "was to put out such a publication and such circulars and advertisements as would lead the public into the supposition that they were buying the Webster's dictionaries as made and edited by the Merriam Publishing Company. * * * The ingenious arrangement * * * of the Ogilvie title page * * * is not fully and unmistakably overcome by printing the name 'George W. Ogilvie, etc.'"

Acts of unfair trade vary in unfairness. Some are serious enough to demand a cautionary notice, some are not. In the Singer case, the Court specifically said that the books of directions issued by the June Company for the use of the "Singer New Family Sewing Machine" which contained no cautionary notice but merely stated in addition to the name "Singer New Family, etc.," manufactured by "June Manufacturing Company," was sufficient. In the Ogilvie case, the Appeal Court enjoined Ogilvie for unfair acts. Whether it ordered a cautionary notice was a purely discretionary matter. The notice did not necessarily follow from the unfair acts.

Ogilvie's book was published about 1904. His circulars had then been published. It is evident that the cautionary notice which the Court finally ordered Ogilvie to use was intended to offset any false impression that had been created by these circulars which he had published and by the misleading character of the title page of his book.

From the foregoing review of the so-called Webster cases, these facts stand out :

(1) All of them rest on the finding of fact by Judge COLT that the Merriams were the *sole publishers of Webster's Dictionaries from 1847 to 1889*. This is absolutely false. At least fifteen other persons published Webster's dictionaries during this period, and probably sold more Webster's Dictionaries in this time than the Merriams themselves did.

(2) Neither Ogilvie nor Saalfeld contested this erroneous finding of fact nor the equally erroneous finding of "second-

ary meaning " based upon it. Indeed Ogilvie on appeal said he was entirely content with it and Saalfeld accepted with the remark that it was not a controverted fact (see *supra*, pp. 63-4).

(3) Judge COLT and the various other Courts assumed that the Merriams were the " original " publishers of Webster's Dictionaries. This also is false. The original publisher of Webster's Dictionary was Hudson & Goodwin of Hartford, Conn. (folio 2684).

(4) All these suits enjoined the Merriams from claiming any exclusive right in Webster's Dictionary.

(5) Persistence of the Merriams in continuing to make such a claim.

Opinion of Coxe, J., on Motion for a Preliminary Injunction.

Every important question presented by this motion has already been decided by the Circuit Court of Appeals of the First and Sixth Circuits.

Merriam v. Ogilvie, 159 Fed. Rep., 638 ; 170 Fed. Rep., 167.

Merriam v. Saalfeld, 190 Fed. Rep., 937.

These decisions, so far at least as this court is concerned, have established the following propositions :

FIRST. The name Webster has a two-fold signification, in that it is the generic name of the dictionary and *is also associated in the public mind with the dictionaries published and sold by the Merriam Company.*

SECOND. Upon the expiration of the copyright in 1889, the book and the name " Webster " were dedicated to the public and any person had a right to publish the dictionary thus set free under the name of " Webster."

THIRD. This name by long association with the Merriams has acquired a secondary meaning and indicates to the public that a dictionary sold under the name of " Webster " is published by the Merriams.

FOURTH. Although the defendant has a right to publish the dictionary upon which the copyright has expired under the

name of "Webster", it must indicate clearly to the public that the book is published by the Syndicate Company and not by the Merriam Company.

FIFTH. Since the expiration, in 1889, of the copyright on Webster's Unabridged Dictionary, The Syndicate Company has the same right as the Merriam Company to publish and sell that edition or a revised and enlarged edition thereof, and to use the name "Webster" in the title.

SIXTH. This right of the public cannot be taken away or abridged on any theory of a trade-mark in the name "Webster" or upon the theory that the publishing and selling by the defendant is unfair competition.

SEVENTH. There is nothing in the size and form of the defendant's books which is calculated to connect the complainant with their publication in the mind of the purchasing public.

EIGHTH. The public must not be deceived into thinking that they are buying the identical book which was produced under the copyright and it is the duty of the defendant to accompany the name "Webster" by such indications as will unmistakably inform the public that the book is put out by the defendant and not by the complainant.

NINTH. The words, "This dictionary is *not* published by the original publishers of Webster's Dictionary or by their successors" printed clearly and unmistakably upon the title page of the defendant's books, together with the publisher's name printed on the title page and also on the back of the book will give the necessary notice to the public and prevent misconception as to the origin of the defendant's dictionaries.

The foregoing propositions are, it is thought, stated with sufficient precision for the purposes of this motion and should be adopted and enforced by this court. This would be so in any case, but particularly so where the fundamental principles upon which the Ogilvie and Saalfeld judgments rest are based upon common sense and are fortified by a long line of decisions of the highest courts of this country and England.

Stated in its briefest terms, the rule laid down in the First and Sixth Circuits is this—Any man has a right to publish a copyrighted book by its generic name after the copyright has expired, but he must tell the truth about it.

I am of the opinion, therefore, that a temporary injunction should issue substantially on the lines of paragraph 2 of the

decree in the Ogilvie case, as amended by the Circuit Court of Appeals of the First Circuit.

I have read the supplementary suggestions of the defendant, giving reasons why an injunction, even as thus limited, should not issue, but I am unable to perceive any valid reason for withholding it. *Indeed, it seems for the interest of both parties that pending final hearing their rights shall be so fixed that there can be no room for further disagreement.*

Complainant Cannot Escape Responsibility for the False Representation on the Title-Cover of its "Condensed" Dictionary that that Book was its "Twentieth Century Edition," nor for the Misstatements Made in the Advertisements of the St. Louis Republic in September, 1911.

Some of the questions propounded by Mr. Hale to the witnesses indicated that an effort might be made by appellant to evade responsibility for the labelling and selling of its "Condensed" dictionary as its "Twentieth Century Edition" or for the repetition of that mendacious representation in the advertising of that book in St. Louis (see pp. 28 to 31 of our brief). If such an effort should be made, we submit the following:

The basis of our charge is that the book is very prominently entitled on its cover "Twentieth Century Edition" (See cut of the book opposite page 28 of our Brief and Exhibit offered in evidence, page 1082). The name of the G. & C. Merriam Co. appears on the title page as publisher and in the copyright notices as proprietor. The proprietor of the copyright presumably chooses the title of his book. Appellant prepared all of the plates from which the book was printed, including, presumably, the plate for printing the cover title. Nowhere in the testimony does appellant expressly or impliedly deny that it gave this false title to the book. But whether or not it gave the book that title, in the first instance, *its Secretary expressly admits that it was fully aware of the fact that its book was sold under that title (fol. 661).* It is con-

ceded that with knowledge of the deception it not only pocketed its proportion of the profits of the St. Louis campaign of 1911, *but it is continuing to-day to pocket profits resulting from the sale of the book under that false title* (Question 24, fol. 665). This fact alone should be enough to charge it with full responsibility for the title.

Responsibility for the advertisements necessarily follows; for they are mere repetitions or elaborations of the false representation in its title that the book is its "Twentieth Century Edition." The representation that the book contained "all the new words" was "up to date" or was "a genuine Twentieth Century Webster's Dictionary" are repetitions of the false statement of the title.

In the same way the statement that the book is a condensation of the "New International" is merely a statement in so many words of what necessarily was to be inferred from the title "Twentieth Century Edition"; for complainant's only twentieth century big book was its "New International." Therefore, as appellant is responsible for the false representations contained in the title, it would be responsible for advertisements which echoed that false representation, even if it did not prepare them.

It is difficult to believe that Reilly & Britton would dare publish, as they did, the assertions that the campaign was "by special arrangement with the G. & C. Merriam Company" and to represent that Company as sponsor for all that the advertisements claimed, unless it had authority to do so (see advertisements offered in evidence by defendant, all of which are in the name of the G. & C. Merriam Co. and none of which in any way mention Reilly & Britton.)

As a matter of fact, however, the attempted evasion of responsibility for the advertisements consists merely in showing that they were prepared by Reilly & Britton and in a denial by *one only* of its officers (its Secretary) that *he* saw them. Reilly & Britton, who prepared them, are described by appellant, in its authorized advertisements, as its "Selling Agents" (fol. 2646). The act of a selling agent done in the course of selling is the act of his principal. *Qui facit per alium facit per se.*

Mr. Swift testified that during his entire conversation with Mr. Knapp, the publisher of the St. Louis Republic, Mr.

Knapp always spoke of the arrangement of their contract with the Merriam people (fol. 7047), and that Mr. Murphy who handled the St. Louis Campaign for the publishers of the dictionary (fol. 7050) admitted to Mr. Swift that he was traveling for the Merriam Company (fols. 6860, 7037).

But whatever the exact relation of Reilly & Britton to complainant, the fact remains that they were jointly sharing the profits of selling a book known by complainant to be falsely labeled.

Furthermore, the attempted denial of knowledge of what advertising was being done to promote appellant's profits is an evasive one, consisting as above stated, solely in a denial by the Secretary of the company that *he* saw the advertisements. Neither the President, Vice-President nor any other officer testified that they did not see them. Undoubtedly, every step in the fierce commercial contest in St. Louis between defendant's book and complainant's book was watched and supervised by one or more of complainant's officers or agents; for complainant's profits depended on the success of that advertising, and facts were advertised which must have been furnished from headquarters, like the statement that defendant's book was printed from plates of the "Old Crown Dictionary, purchased from Dr. Klopsch," etc. (see facsimile advertisement opposite, p. 158, *supra*). The interest with which complainant was watching the St. Louis campaign appears also from the fact that in the midst of it, on October 4th, 1911, appellant set its lawyer-like letter demanding that defendant cease using the name "Webster's."

When it suits appellant's argument to treat Reilly & Britton's advertisements of this book as complainant's own advertisements it does not hesitate to do so. Thus it charges defendant with copying *its* "Uncle Sam" figure and laudatory matter in the *Boston American* (See Appellant's Brief, at p. 51). As soon as the shoe pinches, however, it casts it off, and asserts that it never wore it.

C. & G. MERRILL COMPANY

Copyright, 1911

THE SYNDICATE PUBLISHING COMPANY

Defendant

**Motion Papers on Defendant's Motion to
Dismiss the Appeal of Complaint Against**

HUGH A. BAYNE,

Counsel for Defendant Appellee

C. & G. MERRILL, 1011 G Street, New York.

In the Supreme Court of the United States.

G. & C. MERRIAM COMPANY,
Appellant,

AGAINST

SYNDICATE PUBLISHING COMPANY,
Appellee.

No. 217.
October Term, 1914.

And now comes Syndicate Publishing Company, the appellee above named, by Hugh A. Bayne, its counsel, and moves to dismiss, with costs, the appeal taken herein by the above named G. C. Merriam Company upon the ground that this Court has no jurisdiction of the same, and for other reasons apparent upon the face of said papers.



IN THE SUPREME COURT OF THE UNITED STATES.

G. & C. MERRIAM COMPANY, Appellant, AGAINST SYNDICATE PUBLISHING COMPANY, Appellee.	}	No. 217. October Term, 1914.
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SIR : Please take notice that upon the affidavit of **Frank E. Wright**, hereto annexed, sworn to on the 15th day of February, 1915, and upon the copy of the bill in equity in the District Court of the United States for the Southern District of New York, in the suit above entitled, and the decree of said Court upon said bill in equity, and upon the order and mandate of the Circuit Court of Appeals for the Second Circuit, upon the appeal from said decree, copies of which are hereto annexed, and upon all the papers and proceedings herein, and upon the printed brief, a copy of which is herewith served upon you, I shall, on Monday, the 8th day of March, 1915, and if motions are not then heard, at the next succeeding motion day of this Court, make and submit to the Supreme Court of the United States, at a stated term thereof, to be held in the Capitol, in the City of Washington, District of Columbia, the motion, a copy of which is hereto annexed ; and that I will also then and there move said Court for an order dismissing the appeal herein for want of jurisdiction, and for other reasons which are apparent upon the face of said papers, and that I will then and there move for such other and further relief in the premises as may be just.

New York, February 15th, 1915.

Yours, etc.,

HUGH A. BAYNE,

Of Counsel for Syndicate Publishing Company,
 Appellee.

To **W. B. HALE, Esq.,**

Of Counsel for Complainant, Appellant,
 40 Wall Street,
 New York City.



IN THE SUPREME COURT OF THE UNITED STATES.

G. & C. MERRIAM COMPANY,
Appellant,

AGAINST

SYNDICATE PUBLISHING COMPANY,
Respondent.

No. 217.
October Term, 1914.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss. :
STATE OF NEW YORK, }

FRANK E. WRIGHT, being duly sworn, deposes and says :
I reside in the City, County and State of New York. I am
President of Syndicate Publishing Company, which is the re-
spondent above named.

On or about the 9th day of November, 1911, a bill in
equity by the above named complainant-appellant, against
Syndicate Publishing Company, was filed in the Clerk's office
of the Circuit Court of the United States for the Southern
District of New York, a copy of said bill in equity is hereto
annexed, marked "A". On or about November 29th, 1911,
an amendment to the said bill of complaint was filed in the
Clerk's office of the Circuit Court of the United States for the
Southern District of New York. A copy of said amendment is
hereto annexed, marked "B".

Said bill (at paragraph VI thereof) alleges in substance
that the name "Webster's" has by use and association ac-
quired a secondary meaning indicating dictionaries published
by appellant.

Said bill (at paragraph VIII) alleges that

"the value of the exclusive right in your orator to
use and employ said word 'Webster's' as a whole or a
part of the title of said dictionaries, or either of them,
and to use the same in publishing, selling and adver-
tising for sale, and in marketing said dictionaries, or
either of them, exceeds, exclusive of costs, the sum of
\$50,000 * * *."

Said amendment to said bill alleges (Paragraph First thereof) that

“ the name ‘ Webster ’ has become and now is the genuine trade-mark of your orator, for its said dictionaries * * * and that your orator, and its predecessors, had the legal right to appropriate and use said word ‘ Webster’s ’ as a lawful trade-mark for its said dictionaries * * *.”

Said amendment to said bill then alleges registration by appellant, under the Acts of Congress of a number of trade-marks for dictionaries consisting in part of certain symbols and designs and names in combination with the name “ Webster’s ” and annexed thereto are copies of the certificates of registration of said alleged trade-marks.

Said bill prays (in paragraph IX. thereof) injunctive relief as follows :

“ And that said defendant, its agents, servants, attorneys, and workmen, and each and every of them be restrained and enjoined provisionally and perpetually by the order and injunction of this Honorable Court from directly or indirectly using the word ‘ Webster’s,’ either alone or in association with any other word, in connection with the publication and sale of its said dictionaries, as the name of, or as descriptive of, such dictionaries, or in any other manner without clearly distinguishing such dictionaries from the dictionaries of your orator, and especially from selling and offering for sale its said dictionaries under the name or title of ‘ Webster’s New Standard Dictionary,’ and from publishing and circulating any notices or advertisements wherein its said dictionaries are designated by a name or title in which the word Webster or Webster’s appears, either alone or in connection with other words or any other notices or advertisements in such manner and form that the natural and probable tendency and effect thereof will be to deceive and mislead the public into purchasing said dictionaries as and for the genuine dictionaries of your orator, or as and for an edition of, or the latest edition of either of the

said series of dictionaries published by your orator and its predecessors as aforesaid."

The amendment to said bill amends the foregoing prayer of relief by inserting immediately following the words "Webster's New Standard Dictionary" the following, to wit:

"And from in any manner copying, imitating, or infringing any of your orator's said registered trademarks."

An appearance and answer traversing the material allegations thereof were duly filed by the said Syndicate Publishing Company to said bill as amended. The general replication was thereafter filed by the complainant. Testimony was taken by both parties in support of the issues raised by the said answer and replication. On or about the 6th day of January, 1913, a decree was entered thereupon, after a hearing, a copy of which decree is hereto annexed marked "C." Said decree dismissed the bill of complaint upon the merits, with costs.

Subsequently thereto the said G. & C. Merriam Company duly appealed from said decree to the Circuit Court of Appeals of the United States for the Second Circuit. Said appeal duly came on to be heard. Subsequently thereto, and on or about July 2nd, 1913, the said Circuit Court of Appeals, after argument on behalf of both parties thereto, duly rendered its decision affirming the decree of said District Court, with costs. A copy of said decree is hereto annexed, marked "D."

On or about July 3, 1913, the said complainant obtained from the Honorable H. G. WARD, United States Circuit Judge, an order allowing an appeal from the order and decree of the said Circuit Court of Appeals for the Second Circuit, made and entered on the 2nd day of July, 1913. Said appeal has been docketed and is now pending on the calendar of this Court and is No. 217 on the calendar for the October Term, 1914. Its file No. is 23,795. A citation thereunder has been served upon Syndicate Publishing Company.

Syorn to before me this
17 day of February, 1915.

Frank E. Wright his
X
mark

William P. Vanhook

(W.S.) Notary Public
New York Co., No. 3971
" " Reg. " 6001

Thomas F. Jay

Commissioner of Appeals Mar. 30, 1916



"A."

CIRCUIT COURT OF THE UNITED STATES.

SOUTHERN DISTRICT OF NEW YORK.

G. & C. MERRIAM COMPANY, a Corporation,
Complainant,

vs.

SYNDICATE PUBLISHING COMPANY, a Corporation,
Defendant.

Bill of Complaint,
Eq. 8-162.

TO THE HONORABLE THE JUDGES OF THE CIRCUIT COURT OF THE
UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW
YORK :

G. & C. Merriam Company, a Corporation duly organized under the laws of the State of Massachusetts, brings this its bill of complaint against the Syndicate Publishing Company, a Corporation organized and existing under the laws of the State of New York, and thereupon your orator complains and says :

I.

FIRST. That your orator, the complainant, is a corporation duly organized under the laws of the State of Massachusetts, to wit, on or about the 29th day of March, 1892, and before the commission by the defendant of the acts hereinafter complained of, and is a citizen of said State of Massachusetts carrying on business as a publisher and bookseller, having its main office and place of business at Springfield, in the State of Massachusetts aforesaid, and that the defendant is a corporation organized under the laws of the State of New York, having its principal office and place of business in the Borough

of Manhattan, in the Southern District of New York, and is a citizen of New York, and a resident of said Southern District of New York.

SECOND. That prior to the year 1847 one Noah Webster was the author, proprietor and publisher of numerous books upon various subjects, among which were included several dictionaries of the English language, published respectively in or about the years 1806, 1807, 1828, 1829 and 1840, each of which was known by the name of Webster's Dictionary. That for the purpose of indicating origin and ownership of said books, said Webster caused to be plainly marked, printed or embossed upon the title page or upon the back or cover of each of said books offered for sale the word "Webster's." That in the year 1847, and for a long time prior thereto said word Webster upon the back or cover of a book or upon the title page thereof was well understood by the public to mean that said book was prepared by or under the authority and direction of said Noah Webster, and said books enjoyed a high reputation and commanded a large sale, and the right to use the word Webster thereon became a valuable property right.

THIRD. That said Noah Webster deceased in or about the year 1843, having at the time of his death in course of preparation and in an advanced state of completion a new and revised edition of the previous editions of said Webster's Dictionary. That on or about the year 1847 the firm of G. & C. Merriam, then conducting business as publishers and booksellers at the City of Springfield, in the State of Massachusetts, acquired by purchase and assignment from the executors, the heirs at law and next of kin, and the widow and children of the said Noah Webster, deceased, all the right, title and interest which said Noah Webster had in the aforesaid dictionaries, together with the good will and trade-name thereof, and said firm thereupon proceeded to complete said edition of Webster's Dictionary, employing for that purpose William G. Webster, a son, and Chauncey A. Goodrich, a son-in-law of said Noah Webster, who with numerous other editors and literary men completed said edition and said dictionary was published by said firm of G. & C. Merriam in the year 1847 under the title of "An American Dictionary of the English Language."

FOURTH. That for the purpose of indicating to the public

the author and compiler of said prior editions of said Dictionary and said prior editions' relation to and connection with said edition of the year 1847, and for the purpose of an assurance and guarantee to the public and to consumers and users of dictionaries in general that said edition of the year 1847 was prepared, proof read, printed, bound and published by or under the general supervision of said firm of G. & C. Merriam, said firm adopted as their own special trade-name for said Dictionary, aside from its formal title of "An American Dictionary of the English Language" the name "Webster's Dictionary," either with or without the word "Unabridged," and caused the same to be conspicuously embossed or marked or placed upon the outside or back of said Dictionary, or upon both.

FIFTH. That by reason of the great renown of said Noah Webster as the originator and author of the earlier editions of said Dictionary, and by reason of the great learning and care bestowed by him in preparing the same, and by reason of the great learning, skill and care of the editors and assistants in preparing and editing the later editions thereof, and by reason of the great skill and care exercised by said firm of G. & C. Merriam in preparing, type-setting, printing, proof reading, binding, publishing and advertising said Dictionary, it became well known and understood among the trade and by all booksellers, dealers in and users of Dictionaries and by the public in general, that all Dictionaries bearing the title "Webster's Dictionary," either alone or in combination with other words, were the Dictionaries so prepared and printed and published by said firm of G. & C. Merriam and none other, and the said title "Webster's Dictionary" both with and without said other words became a guarantee of the accuracy of said book and a guarantee that the same had been prepared by the said G. & C. Merriam and their said editors and assistants and by none other, and a guarantee of the correctness of said book as a Dictionary of the English language, and by said name became well known as the book so prepared by the said firm of G. & C. Merriam and by said name it was described in all printed catalogues, accounts, statements and advertisements and in all correspondence held by said firm, and was cited as an authority in courts of law and by the public in general, and was known

by all people desiring to purchase and to use a Dictionary as the book of the said G. & C. Merriam and theirs exclusively.

SIXTH. And your orator further shows unto your Honors that subsequently the firm of G. & C. Merriam continued to print and publish said Dictionary and to sell the same by its said title "An American Dictionary of the English Language," but more commonly by their own special trade-name or title "Webster's Dictionary," either with or without the descriptive word "Unabridged," until about the year 1864, when said G. & C. Merriam caused a new and greatly enlarged and thoroughly revised edition of said dictionary to be prepared by Noah Porter, with the assistance of said William G. Webster and Chauncey A. Goodrich, and a large corps of expert editors and assistants, and thereafter the said edition of the year 1847 was entirely withdrawn from the market.

That for the purpose of indicating to the public the authors of said revision and its connection with the prior editions thereof, and said prior editors' relation to our connection with said edition of the year 1864, and for the purpose of a further assurance and guarantee to the public and to consumers and users in general, that said edition of the year 1864, was prepared, proof read, printed, bound and published by or under the general supervision of the said firm of G. & C. Merriam, said firm renewed and continued as their own special trade-name for the Dictionary of 1864, aside from its formal title, the name "Webster's Dictionary," either with or without the word "Unabridged," and caused the same to be marked or placed upon the outside or back of said Dictionary, or both, as they had previously done in the case of the earlier editions thereof and which said revision was duly copyrighted according to law.

SEVENTH. That thereafter said Dictionaries become still more widely known and highly esteemed by the trade and by the public in general by their said name of Webster's Dictionary as the literary work of said Webster and his son and son-in-law and said Noah Porter and their said assistants, and as the typography, composition, electrotyping, printing and binding of the said firm of G. & C. Merriam and after the transfer to G. & C. Merriam & Co. and your orator as herein-after set forth, as the typography, composition, electrotyping,

printing and binding of the said G. & C. Merriam & Co. or of your orator G. & C. Merriam Company respectively, and none other, by means of which the public and purchasers and users of Dictionaries had and have an assurance of the literary as well as of the typographical and mechanical quality of the goods, and of the integrity of your orator in the preparation, printing and binding of said Dictionary and of all the mechanical work employed therein.

EIGHTH. Your orator further shows to your Honors that on or about the year 1867 said G. & C. Merriam caused to be prepared and printed and published a certain other Dictionary of the English Language which was an abridgment from the said American Dictionary of the English Language of Noah Webster, and the title of which was set forth on the title page thereof as follows :

“ A Primary School Dictionary of the English Language ; Explanatory, Pronouncing and Synonymous, with an appendix containing various Useful Tables ; Mainly Abridged from the Latest Edition of the American Dictionary of Noah Webster, LL.D., by Wm. G. Webster and Wm. A. Wheeler. Illustrated with more than 200 Engravings on Wood,”

and which was copyrighted according to the laws of the United States in the year 1867 by G. & C. Merriam.

That for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with said Dictionaries of the year 1847 and the year 1864, and for the purpose of further assurance and guarantee to the public and purchasers and users of Dictionaries in general that said “ Primary School Dictionary ” of the English Language was prepared, proof read, printed, bound and published by or under the general supervision of the said firm of G. & C. Merriam, said firm also adopted and added as their own special trade-name for said Dictionary aside from its formal title of a “ Primary School Dictionary of the English Language ” the name “ Webster's Primary School Dictionary ” and cause the same to be printed or embossed upon the front cover or back or both of said Dictionary.

That by reason of the great skill and care exercised by

said G. & C. Merriam in preparing said book, the same became universally known among the trade and to the public in general by its cover or outside title of Webster's Primary School Dictionary, and said cover or outside title became a guarantee of the accuracy of said book, and a guarantee that the same had been prepared by the said G. & C. Merriam and no one else and by said title or cover title or name of Webster's Primary Dictionary the same was described in all printed catalogues, accounts, statements and advertisements and in all correspondence held by the said firm with the public in general and became known by said name Webster's Primary School Dictionary by all people desiring to purchase and sell or use such a Dictionary as the book of the said G. & C. Merriam exclusively.

NINTH. Your orator further shows to your Honors that on or about the year 1867 said G. & C. Merriam caused to be prepared and printed and published a certain other Dictionary of the English Language which was an abridgment from the said American Dictionary of the English Language of Noah Webster, and the title of which was set forth on the title page thereof as follows :

" A Common School Dictionary of the English Language ; Explanatory ; Pronouncing and Synonymous ; with an Appendix containing Various Useful Tables ; mainly Abridged from the latest edition of the American Dictionary of Noah Webster, LL.D., by Wm. G. Webster and Wm. A. Wheeler, Illustrated with nearly 250 Engravings on Wood,"

and which was copyrighted according to the laws of the United States in the year 1867 by G. & C. Merriam.

That for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with said Dictionaries of the year 1847 and the year 1864, and for the purpose of further assurance and guarantee to the public and purchasers and users of Dictionaries in general that said Common School Dictionary of the English Language was prepared, proof read, printed, bound and published by or under the general supervision of the said firm of G. & C. Merriam, said firm also adopted and

added as their own special trade-name for said Dictionary aside from the formal title of a Common School Dictionary of the English Language, the name "Webster's Common School Dictionary" and caused the same to be printed and embossed upon the front cover or back or both of said Dictionary.

That by reason of the great skill and care exercised by said G. & C. Merriam in preparing said book, the same became universally known, among the trade and to the public in general, by its cover or outside title of Webster's Common School Dictionary, and said cover or outside title became a guarantee of the accuracy of said book, and a guarantee that the same had been prepared by said G. & C. Merriam and no one else, and by said cover title or name of Webster's Common School Dictionary the same was described in all printed catalogues, accounts, statements and advertisements and in all correspondence held by the said firm with the public in general and became known by said name Webster's Common School Dictionary by all people desiring to purchase and sell or use such a Dictionary as a book of the said G. & C. Merriam exclusively.

TENTH. Your orator further shows to your Honors that on or about the year 1867 said G. & C. Merriam caused to be prepared and printed and published a certain other Dictionary of the English Language which was an abridgment from the Quarto Dictionary of Noah Webster, LLD., and the title of which was set forth on the title page thereof as follows:

"Academic Edition, A Dictionary of the English Language; Explanatory, Pronouncing, Etymological and Synonymous. With an Appendix containing Various Useful Tables; Mainly Abridged from the Latest Edition of the Quarto Dictionary of Noah Webster, LLD., by Wm. G. Webster and Wm. A. Wheeler. Illustrated with more than 350 Engravings on Wood,"

and which was copyrighted according to the laws of the United States in the year 1867 by G. & C. Merriam.

That for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with said Dictionaries of the year 1847

and the year 1864, and for the purpose of further assurance and guarantee to the public and purchasers and users of Dictionaries in general that said Dictionary of the English Language was prepared, proof read, printed, bound and published by or under the general supervision of the said firm of G. & C. Merriam, said firm also adopted and added as their own special trade-name for said Dictionary aside from its formal title of "A Dictionary of the English Language" the name "Webster's Academic Dictionary" and caused the same to be printed or endorsed upon the front cover or back or both of said Dictionary.

That by reason of the great skill and care exercised by said G. & C. Merriam in preparing said book, the same became universally known among the trade and to the public in general by its cover or outside title of Webster's Academic Dictionary, and said cover or outside title became a guarantee of the accuracy of said book, and a guarantee that the same had been prepared by the said G. & C. Merriam and no one else, and by said cover title or name of Webster's Academic Dictionary the same was described in all printed catalogues, accounts, statements and advertisements and in all correspondence held by the said firm with the public in general and became known by said name Webster's Academic Dictionary by all people desiring to purchase and sell or use such a Dictionary as the book of the said G. & C. Merriam exclusively.

ELEVENTH. Your orator further shows to your Honors that on or about the year 1867 said G. & C. Merriam caused to be prepared and printed and published a certain other Dictionary of the English Language which was an abridgment from the said Quarto Dictionary of the English Language of Noah Webster, LL.D., and the title of which was set forth on the title page thereof as follows :

"A Dictionary of the English Language ; Explanatory, Pronouncing, Etymological and Synonymous ; With a Copious Appendix. Mainly Abridged From the Quarto Dictionary of Noah Webster, LL.D. Revised by Chauncey A. Goodrich, DD., and Noah Porter, D.D., by Wm. A. Wheeler. Illustrated with more than 600 Engravings on Wood,"

and which was copyrighted according to the laws of the United States in the year 1867 by G. & C. Merriam.

That for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with said Dictionaries of the year 1847 and the year 1864, and for the purpose of further assurance and guarantee to the public and purchasers and users of Dictionaries in general that said Dictionary of the English Language was prepared, proof read, printed, bound and published by or under the general supervision of the said firm of G. & C. Merriam, said firm also adopted and added as their own special trade name for said Dictionary aside from its formal title of a Dictionary of the English Language the name "Webster's National Pictorial Dictionary," and caused the same to be printed or embossed upon the front cover or back of said Dictionary.

That by reason of the great skill and care exercised by G. & C. Merriam in preparing said book, the same became universally known among the trade and to the public in general by its cover or outside title of Webster's National Pictorial Dictionary, and said cover or outside title became a guarantee of the accuracy of said book, and a guarantee that the same had been prepared by the said G. & C. Merriam and no one else, and by said cover title or name of Webster's National Pictorial Dictionary the same, was described in all printed catalogues, accounts, statements and advertisements and in all correspondence held by the said firm with the public in general and became known by said name Webster's National Pictorial Dictionary by all people desiring to purchase and sell or use such a Dictionary as the book of the said G. & C. Merriam exclusively.

TWELFTH. Your orator further shows to your Honors that on or about the year 1868 said G. & C. Merriam caused to be prepared and printed and published a certain other Dictionary of the English Language which was an abridgment from the Quarto Dictionary of the English Language of Noah Webster, LL.D., and the title of which was set forth on the title page thereof as follows :

"A High School Dictionary of the English Language; Explanatory, Pronouncing and Synonymous :

With an Appendix Containing Various Useful Tables ;
Mainly Abridged from the Latest Edition of the Quarto
Dictionary of Noah Webster, LL.D., by Wm. G.
Webster and Wm. A. Wheeler. Illustrated with more
than 300 Engravings on Wood,"

and which was copyrighted according to the laws of the United States in the year 1868 by G. & C. Merriam.

That for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with said Dictionaries of the year 1847 and the year 1864, and for the purpose of further assurance and guarantee to the public and purchasers and users of Dictionaries in general that said High School Dictionary of the English Language was prepared, proof read, printed, bound and published by or under the general supervision of the said firm of G. & C. Merriam, said firm also adopted and added as their own special trade-name for said Dictionary aside from its formal title of "A High School Dictionary of the English Language" the name Webster's High School Dictionary, and caused the same to be printed or embossed upon the front cover or back or both of said Dictionary.

That by reason of the great skill and care exercised by said G. & C. Merriam in preparing said book, the same became universally known among the trade and to the public in general by its cover or outside title of Webster's High School Dictionary, and said cover or outside title became a guarantee of the accuracy of said book, and a guarantee that the same had been prepared by the said G. & C. Merriam and no one else, and by said cover title or name of Webster's High School Dictionary the same was described in all printed catalogues, accounts, statements and advertisements and in all correspondence held by the said firm with the public in general and became known by said name Webster's High School Dictionary by all people desiring to purchase and sell or use such a dictionary as the book of the said G. & C. Merriam exclusively.

THIRTEENTH. Your orator further shows to your Honors that on or about the year 1870 said G. & C. Merriam caused to be prepared and printed and published a certain other Dictionary of the English language which was an abridgment from said American Dictionary of the Eng-

lish Language of Noah Webster, and the title of which was set forth on the title page thereof as follows :

“A Pocket Dictionary of the English Language abridged from the American edition of Noah Webster, LL. D., by William G. Webster and William A. Wheeler, illustrated with nearly 200 engravings on wood.”

and which was copyrighted according to the laws of the United States in the year 1870 by the said G. & C. Merriam.

That for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with said Dictionaries of the year 1847 and the year 1864, and for the purpose of further assurance and guarantee to the public and purchasers and users of Dictionaries in general that said Pocket Dictionary of the English Language was prepared, proof read, printed, bound and published by or under the general supervision of the said firm of G. & C. Merriam, said firm also adopted and added as their own special trade-name for said Dictionary aside from the formal title of “A Pocket Dictionary of the English Language,” the name “Webster's Pocket Dictionary” and caused the same to be printed or embossed upon the front cover or back or both of said Dictionary.

That by reason of the great skill and care exercised by the said G. & C. Merriam in preparing said book, the same became universally known among the trade and to the public in general by its cover or outside title of “Webster's Pocket Dictionary,” and said cover or outside title became a guarantee of the accuracy of said book and a guarantee that the same had been prepared by the said G. & C. Merriam and no one else, and by said outside or cover title or name of Webster's Pocket Dictionary the same was described in all printed catalogues, accounts, statements and advertisements and in all correspondence held by the said firm with the public in general and became known by said name “Webster's Pocket Dictionary” by all people desiring to purchase and sell or use such a Dictionary as the book of said G. & C. Merriam exclusively.

FOURTEENTH. Your orator further shows unto your Honors that on or about the year 1879 said G. & C. Merriam caused

to be prepared and printed and published a certain other Dictionary of the English Language which was a new edition of the said Dictionary of 1864, and the title of which was set forth on the title page thereof as follows, to wit :

“ An American Dictionary of the English Language, by Noah Webster, LL.D., thoroughly revised and greatly enlarged and improved by Chauncey A. Goodrich, D.D., LL.D., late professor in Yale College, and Noah Porter, D.D., LL.D., President of Yale College, with an appendix of useful tables to which is added a supplement of nearly 5,000 new words with their definitions, also a new pronouncing biographical Dictionary containing nearly 10,000 names of noted persons of ancient and modern times, giving their nationality, occupation and dates of their birth and death.”

That said Dictionary was copyrighted according to the laws of the United States in the year 1879 by said G. & C. Merriam, and for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with said Dictionaries of the year 1847 and the year 1864, and for the purpose of further assurance and guarantee to the public and to all purchasers and users of Dictionaries in general that said American Dictionary of the English Language was prepared, proof read, printed, bound and published by or under the general supervision of the said firm of G. & C. Merriam, said firm also adopted as their own special trade-name for their said Dictionary aside from its formal title of an “ American Dictionary of the English Language ” the name “ Webster's Dictionary ” either with or without the descriptive word “ Unabridged ” and caused the same to be printed or embossed upon the front cover or upon the back of each of said Dictionaries or upon both.

That by reason of the great skill and care exercised by said G. & C. Merriam in preparing said book, the same became known to the trade and to the public in general by its cover or outside title of Webster's Unabridged Dictionary, and said cover or outside title became a guarantee of the accuracy of the said book, and a guarantee that the same had been pre-

pared by the said G. & C. Merriam and no one else, and by its said cover and outside title of Webster's Dictionary or Webster's Unabridged Dictionary the same was described in all printed catalogues, accounts, statements and advertisements and in all correspondence held by said firm with the public in general and became known by said name Webster's Dictionary or Webster's Unabridged Dictionary to all people desiring to purchase and use such a Dictionary and was cited as an authority by courts of law and Judges thereof as the Dictionary of said G. & C. Merriam exclusively.

FIFTEENTH. Your orator further shows unto your Honors that on or about the year 1882 said G. & C. Merriam caused to be prepared and printed and published a certain other Dictionary of the English Language which was a new edition of the said Dictionary of 1864, and the title of which was set forth on the title page thereof as follows, to wit :

“ Subscription Edition, with Historical Supplement. An American Dictionary of the English Language, by Noah Webster, LL.D., thoroughly revised and greatly enlarged and improved by Chauncey A. Goodrich, D.D., late Professor in Yale College, and Noah Porter, President of Yale College. With an appendix of useful tables, to which is added a supplement of nearly 5,000 words with their definitions, etc., also a new pronouncing Biographical Dictionary containing nearly 10,000 names of noted persons in ancient and modern times, giving their nationality, their occupation, and the dates of their birth and death. With a Historical Supplement containing a brief history of the United States, and of each State, lives of the Presidents from Washington to Arthur, with a portrait of each, and a great variety of other valuable information.”

That said Dictionary was copyrighted according to the laws of the United States in the year 1882 by said G. & C. Merriam. That for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with said Dictionaries of the year 1847 and the year 1864, and for the purpose of further assurance and guarantee to the public and to all purchasers, sellers and users of Dictionaries in general that said

American Dictionary of the English Language was prepared, proof read, printed, bound and published by or under the general supervision of the said firm of G. & C. Merriam, said firm also adopted as their own special trade-name for their said Dictionary aside from its formal title of "An American Dictionary of English Language," the name "Webster's Dictionary" either with or without the descriptive word "Unabridged," and caused the same to be printed or embossed upon the front cover or upon the back of said Dictionaries or upon both.

That by reason of the great skill and care exercised by the said G. & C. Merriam in preparing said book, the same became known to the trade and to the public in general by its cover or outside title of Webster's Dictionary or Webster's Unabridged Dictionary, and said outside or cover title became a guarantee of the accuracy of the said book, and a guarantee that the same had been prepared by the said G. & C. Merriam exclusively and by its said cover or outside title of Webster's Dictionary or Webster's Unabridged Dictionary, the same was described in all printed catalogues, accounts, statements and advertisements and in all correspondence held by said firm with the public in general and became known by said name, Webster's Dictionary or Webster's Unabridged Dictionary by all people desiring to purchase and use such a Dictionary, and was cited as an authority by courts of law and Judges thereof as the book of the said G. & C. Merriam and of no one else.

SIXTEENTH. On information and belief, that prior to the year 1864 complainant's predecessor, the said firm of G. & C. Merriam acquired by purchase and assignment from the owners of the copyrights thereof, and from the respective publishers thereof, all the right, title and interest which said owners and publishers respectively had in and to all dictionaries theretofore published and sold under a name or names of which the words "Webster" or "Webster's" formed a part, together with the good-will and trade-name thereof. That prior to said year 1864, all rights in all then existing "Webster" dictionaries, both abridged and unabridged, became and were concentrated and vested in complainant's predecessors, said firm of G. & C. Merriam. That among the Dictionaries so acquired by complainant's said predecessor, were the following named diction-

aries, to wit, "A Primary School Dictionary," copyrighted in or about the year 1838 by Noah Webster; "A Pocket Dictionary," copyrighted in or about the year 1846 by William G. Webster; a dictionary abridged from the quarto edition of Noah Webster, copyrighted in or about the year 1847 by Chauncey A. Goodrich; "A High School Dictionary," copyrighted in or about the year 1848 by William E. Ellsworth and Henry White, executors of Noah Webster; "A New University Pronouncing Dictionary," copyrighted in or about the year 1856 by William E. Ellsworth and others, each and all of which said dictionaries had printed or embossed on the back or cover thereof the word "Webster's."

II.

FIRST. And your orator further shows that on or about the year 1882 by a partial change in and addition to the number of members of the firm of G. & C. Merriam, the firm of G. & C. Merriam & Co. was formed, which said firm of G. & C. Merriam & Co. succeeded to all the rights of the said firm of G. & C. Merriam and the firm of G. & C. Merriam assigned and transferred their said publishing business and all their rights, title, interest and good will in and to the business and property of said firm, including the exclusive right to print, publish and sell said Dictionaries and all of them, and the use of the name Webster and all other names and titles applied to said Dictionaries by said firm of G. & C. Merriam to said firm of G. & C. Merriam & Co., and which said firm of G. & C. Merriam & Co. continued to carry on business at said City of Springfield, in the State of Massachusetts, as it had been previously carried on by said firm of G. & C. Merriam, until the assignment and transfer to your orator as hereinafter set forth.

SECOND. Your orator further shows unto your Honors that on or about the year 1884 said G. & C. Merriam & Co. caused to be prepared and printed and published a certain other Dictionary of the English Language, the title of which was set forth on the title page thereof as follows, to wit :

"A Practical Dictionary of the English Language, giving the correct spelling, pronunciation and definition of words, with an appendix containing various useful

tables chiefly derived from Webster's Unabridged Dictionary ; edited under the supervision of Noah Porter, D.D., LL.D., President of Yale College. By Dorsey Gardner. With nearly 1,500 illustrations."

That said Dictionary was copyrighted according to the laws of the United States in the year 1884 by said G. & C. Merriam & Co., and for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with said Dictionaries of the year 1847 and the year 1864, and for the purpose of further assurance and guarantee to the public and to all purchasers, sellers and users of Dictionaries in general that said Practical Dictionary was prepared, proof read, printed, bound and published by or under the general supervision of the said firm of G. & C. Merriam & Co., said firm also adopted as their own special trade-name for their said Dictionary aside from its formal title of "A Practical Dictionary of the English Language" the name "Webster's Practical Dictionary" and caused the same to be printed upon the top of the title page and also printed or embossed upon the front cover or upon the back of each of said Dictionaries or upon both.

That by reason of the great skill and care exercised by the said G. & C. Merriam & Co. in preparing said book, the same became known to the trade and to the public in general by its cover or outside title of Webster's Practical Dictionary, and said outside or cover title became a guarantee of the accuracy of the said book, and a guarantee that the same had been prepared by the said G. & C. Merriam & Co., and by its said outside or cover title of Webster's Practical Dictionary the same was described in all printed catalogues, accounts, statements and advertisements and in all correspondence held by said firm with the public in general and became known by said name Webster's Practical Dictionary by all people desiring to purchase and use such a Dictionary as the book of the said G. & C. Merriam & Co. exclusively.

THIRD. Your orator further shows unto your Honors that on or about the year 1884 said G. & C. Merriam & Co. caused to be prepared and printed and published a certain other Dictionary of the English Language which was a new

edition of the said Dictionary of 1864, and the title of which was set forth on the title page thereof as follows, to wit :

“ New Edition with Supplement. An American Dictionary of the English Language. By Noah Webster, LL.D., thoroughly revised and greatly enlarged and improved by Chauncey A. Goodrich, D.D., late Professor in Yale College, and Noah Porter, D.D., LL.D., President of Yale College. With an appendix of useful tables to which is added a Supplement of nearly 5,000 new words with their definitions, etc. A New Pronouncing Gazetteer of the World, containing names of over 25,000 places, also a new Pronouncing Biographical Dictionary containing nearly 10,000 names of noted persons in ancient and modern times.”

That said Dictionary was copyrighted according to the laws of the United States in the year 1884 by the said G. & C. Merriam & Co., and that for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with the said Dictionaries of the year 1847 and the year 1864, and for the purpose of further assurance and guarantee to the public and to all purchasers, sellers and users of Dictionaries in general that said American Dictionary of the English Language was prepared, proof read, printed, bound and published by or under the general supervision of the said G. & C. Merriam & Co., said firm also adopted as their own special trade-name for their said Dictionary aside from its formal title of “ An American Dictionary of the English Language ” the name “ Webster's Dictionary ” either with or without the descriptive word “ Unabridged,” and caused the same to be printed or embossed upon the front cover or upon the back of each of said Dictionaries or upon both. .

That by reason of the great skill and care exercised by the said G. & C. Merriam & Co. in preparing said book, the same became known to the trade and to the public in general by its cover or outside title of Webster's Dictionary or Webster's Unabridged Dictionary, and said title became a guarantee of the accuracy of the said book, and a guarantee that the same had been prepared by the said G. & C. Merriam &

Co. exclusively, and by its cover or outside title of Webster's Dictionary or Webster's Unabridged Dictionary the same was described in all printed catalogues, accounts, statements and advertisements and in all correspondence held by said firm with the public in general, and became known by said name Webster's Dictionary or Webster's Unabridged Dictionary by all people desiring to purchase and use such a Dictionary as the book of the said G. & C. Merriam & Co. exclusively.

FOURTH. Your orator further shows unto your Honors that on or about the year 1884 said G. & C. Merriam & Co. caused to be prepared and printed and published a certain other Dictionary of the English Language, the title of which was set forth on the title page thereof as follows, to wit :

" A Condensed Dictionary of the English Language with copious etymological derivations, pronunciations, spelling and appendixes for general reference ; chiefly derived from the Unabridged Dictionary of Noah Webster, LL.D. Edited under the supervision of Noah Porter, DD., LL.D., President of Yale College. By Dorsey Gardner ; with over 1,500 illustrations."

That said Dictionary was copyrighted according to the laws of the United States in the year 1884 by the said G. & C. Merriam & Co. and for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with said Dictionaries of the year 1847 and the year 1864, and for the purpose of further assurance and guarantee to the public and to all purchasers, sellers and users of Dictionaries in general that said American Dictionary of the English Language was prepared, proof read, printed, bound and published by or under the general supervision of the said G. & C. Merriam & Co. said firm also adopted as their own special trade-name for their said Dictionary aside from its formal title "A Condensed Dictionary" the name "Webster's Condensed Dictionary" and caused the same to be printed or embossed upon the front cover or upon the back or both of each of said Dictionaries and also prefixed the same to the title as their own special trade-name.

That by reason of the great skill and care exercised by the

said G. & C. Merriam & Co. in preparing said book, the same became known to the trade and to the public in general by its cover or outside title of Webster's Condensed Dictionary, and said outside cover title became a guarantee of the accuracy of the said book, and a guarantee that the same had been prepared by the said G. & C. Merriam & Co. exclusively, and by its said cover or outside title of Webster's Condensed Dictionary the same was described in all printed catalogues, accounts, statements and advertisements and in all correspondence held by said firm with the public in general and became known by said name Webster's Condensed Dictionary by all people desiring to purchase, sell and use such a Dictionary as the book of the said G. & C. Merriam & Co. exclusively.

FIFTH. Your orator further shows unto your Honors that on or about the year 1890 said G. & C. Merriam & Co. caused to be prepared and printed and published a certain other Dictionary of the English Language, the title of which was set forth on the title page thereof as follows, to wit :

" Webster's International Dictionary of the English Language. Being the authentic edition of Webster's Unabridged Dictionary comprising issues of 1864, 1879 and 1884. Now thoroughly revised and enlarged under the supervision of Noah Porter, D.D. LL.D., of Yale University. With a voluminous appendix."

That said Dictionary was copyrighted according to the laws of the United States in the year 1890 by said G. & C. Merriam & Co.

That the name " Webster " was embodied in the title and printed or embossed upon the front cover and back of each of said Dictionaries in addition to the words " International Dictionary," for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with said Dictionaries of the years 1828, 1841, 1847, 1859, 1864, 1879, 1882 and 1884, and for the purpose of further assurance and guarantee to the public and to all purchasers, sellers and users of Dictionaries in general that said Webster's International Dictionary was prepared, proof read, printed, bound and published by or under the

general supervision of the said firm of G. & C. Merriam & Co. and the words "Webster's Dictionary" either with or without the word "International" became the trade-name and distinguishing mark of said Dictionary.

That by reason of the great care and skill exercised by the said G. & C. Merriam & Co. in preparing said book and placing same upon the market, the same became known to the trade and to the public in general by its cover or outside title of Webster's International Dictionary, but more commonly by the name Webster's Dictionary, said word International being used merely to distinguish said Dictionary from the earlier editions thereof, and said word Webster became a guarantee of the accuracy of said book, and a guarantee that same had been prepared by the said G. & C. Merriam & Co., exclusively, and said word Webster was used in describing said book in all printed catalogues, accounts, statements and advertisements, and in all correspondence held by said firms with the public in general, and said book became known as Webster's Dictionary or Webster's International Dictionary, by all people desiring to purchase and use such a Dictionary, and by said name was cited as an authority by courts of law and Judges thereof as the book of said G. & C. Merriam & Co. exclusively.

III.

FIRST. And your orator further shows that on or about the year 1892, your orator was duly created a corporation by and under the laws of the State of Massachusetts as hereinbefore set forth, and thereupon the said publishing business of said firm of G. & C. Merriam & Co. and the right, title, interest and good will of said firm in and to said business and property including the exclusive right to print, publish and sell said Dictionaries and all of them, and to use the name Webster and all other names and titles applied to said Dictionaries by the said firms G. & C. Merriam and G. & C. Merriam & Co. were duly assigned and transferred to and became legally vested in your orator, and your orator thereafter continued to carry on said publishing business at

said City of Springfield in the State of Massachusetts as it had previously been carried on by said G. & C. Merriam and G. & C. Merriam & Co.

SECOND. Your orator shows further unto your Honors that subsequently on or about the year 1892, your orator, said G. & C. Merriam Co. caused to be prepared and printed and published a certain other Dictionary of the English Language, the title of which was set forth on the title page thereof as follows, to wit :

“ A Dictionary of the English Language ; designed for use in the Primary Schools. Abridged from Webster's International Dictionary ; 400 illustrations.”

That said Dictionary was copyrighted according to the laws of the United States in the year 1892 by said G. & C. Merriam Co., and that for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with said Dictionaries of the year 1847 and the year 1864 and 1890, and for the purpose of further assurance and guarantee to the public and to all purchasers, sellers or users of Dictionaries in general that said Primary Dictionary was prepared, proofread, printed, bound and published by or under the general supervision of your orator, your orator also adopted as its own special trade-name for said Dictionary aside from its formal title the words “ Webster's Primary School Dictionary,” and caused the same to be printed upon the top of the title page and also printed or embossed upon the front cover or back or each of said Dictionaries or upon both.

That by reason of the great skill and care exercised by your orator in preparing said book, the same became known to the trade and to the public in general by its cover or outside title of Webster's Primary Dictionary, and said cover or outside title became a guarantee of the accuracy of the said book, and a guarantee that the same had been prepared by your orator, the said G. & C. Merriam Co. exclusively, and by its said cover or outside title of Webster's Primary Dictionary the same was described in all printed catalogues, accounts, statements and advertisements and in

all correspondence held by said firm with the public in general and became known as Webster's Primary Dictionary by all people desiring to purchase, sell and use such a Dictionary as the book of your orator, the said G. & C. Merriam Co. exclusively.

THIRD. Your orator further shows unto your Honors that on or about the year 1892 said G. & C. Merriam Co. caused to be prepared and printed and published a certain other Dictionary of the English Language, the title of which was set forth on the title page thereof as follows, to wit :

" A Dictionary of the English Language with an appendix containing a pronouncing vocabulary of biblical, classical, mythological, historical and geographical proper names. Abridged from Webster's International Dictionary ; 800 illustrations."

That said Dictionary was copyrighted according to the laws of the United States in the year 1892 by your orator, said G. & C. Merriam Co. and for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with said Dictionaries of the year 1847 and the year 1864 and 1890, and for the purpose of further assurance and guarantee to the public and to all purchasers, sellers and users of Dictionaries in general that said Webster's High School Dictionary was prepared, proof read, printed, bound and published by or under the general supervision of the said G. & C. Merriam Co., your orator also adopted as its own special trade-name for its said Dictionary aside from its formal title the words " Webster's High School Dictionary," and caused the same to be printed upon the top of the title page and also printed or embossed upon the front cover or upon the back of each of said Dictionaries or upon both.

That by reason of the great skill and care exercised by the said G. & C. Merriam Co. in preparing said book, the same became known to the trade and to the public in general by its cover or outside title of Webster's High School Dictionary, and said title became a guarantee of the accuracy of the said book, and a guarantee that the same had been prepared by your orator, the said G. & C. Merriam Co., exclusively, and by

its said cover or outside title of Webster's High School Dictionary the same was described in all catalogues, accounts, statements and advertisements and in all correspondence held by said firm with the public in general and became known by said name Webster's High School Dictionary by all people desiring to purchase, sell or use such a Dictionary as the book of your orator, said G. & C. Merriam Co. exclusively.

FOURTH. Your orator further shows unto your Honors, that on or about the year 1892 your orator, the said G. & C. Merriam Co. caused to be prepared and printed and published a certain other Dictionary of the English Language, and the title of which was set forth on the title page thereof as follows, to wit :

" A dictionary of the English Language, designed for use in common schools. Abridged from Webster's International Dictionary ; 500 illustrations."

That said Dictionary was copyrighted according to the laws of the United States in the year 1892 by your orator, said G. & C. Merriam Co., and for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with the said Dictionaries of the year 1847 and the year 1864 and the year 1890, and for the purpose of further assurance and guarantee to the public and to all purchasers, sellers and users of Dictionaries in general that said Common School Dictionary was prepared, proof read, printed, bound and published by or under the general supervision of your orator, your orator also adopted as its own special trade-name for its said Dictionary aside from its formal title the words " Webster's Common School Dictionary," and caused the same to be printed upon the top of the title page and also printed or embossed upon the front cover or upon the back of each of said Dictionaries or upon both.

That by reason of the great skill and care exercised by your orator in preparing said book, the same became known to the trade and to the public in general by its cover or outside title of Webster's Common School Dictionary, and said cover or outside title became a guarantee of the accuracy of the said book, and a guarantee that the same had been prepared,

printed and published by the said G. & C. Merriam Co. exclusively, and by its said cover or outside title "Webster's Common School Dictionary" the same was described in all printed catalogues, accounts, statements and advertisements and in all correspondence held by your orator with the public in general and became known by said name Webster's Common School Dictionary by all people desiring to purchase, sell or use such a Dictionary as the book of your orator, the said G. & C. Merriam Co. exclusively.

FIFTH. Your orator further shows unto your Honors that on or about the year 1895 your orator caused to be prepared and printed and published a certain other Dictionary of the English Language, and the title of which was set forth on the title page thereof as follows, to wit :

"A Dictionary of the English Language, giving derivations, pronunciations, definition and synonyms of a large vocabulary of words in common use; with an appendix containing various useful tables. Abridged from Webster's International Dictionary; over 800 illustrations."

That said Dictionary was copyrighted according to the laws of the United States in the year 1895 by your orator, and for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with said Dictionaries of the year 1847 and the years 1864, 1890 and 1892, and for the purpose of further assurance and guarantee to the public and to all purchasers, sellers and users of Dictionaries in general that said Dictionary was prepared, proof read, printed, bound and published by or under the general supervision of the said G. & C. Merriam Co., your orator also adopted as its own special trade-name for its said Dictionary aside from its formal title the words "Webster's Academic Dictionary," and caused the same to be printed upon the top of the title page and also printed or embossed upon the front cover or upon the back of each of said Dictionaries, or upon both.

That by reason of the great skill and care exercised by the said G. & C. Merriam Co. in preparing said book, the same

became known to the trade and to the public in general by its cover or outside title of Webster's Academic Dictionary, and said cover or outside title became a guarantee of the accuracy of the said book and a guarantee that the same had been prepared by your orator, the said G. & C. Merriam Co. exclusively, and by its said name Webster's Academic Dictionary the same was described in all printed catalogues, accounts, statements and advertisements and in all correspondence held by said firm with the public in general and became known by said name Webster's Academic Dictionary by all people desiring to purchase and use such a Dictionary as the book of your orator, the said G. & C. Merriam Co. exclusively.

SIXTH. Your orator further shows unto your Honors that on or about the year 1896 said G. & C. Merriam Co. caused to be prepared and printed and published a certain other Dictionary of the English Language, the title of which was set forth on the title page thereof as follows, to wit :

"A Dictionary of the English Language giving the derivations, pronunciations, definitions and synonyms of a large vocabulary of the words in common use. With an appendix containing commercial and various other useful tables, mainly abridged from Webster's International Dictionary ; over 800 illustrations."

That said Dictionary was copyrighted according to the laws of the United States in the year 1895 by said G. & C. Merriam Co., and for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with the Dictionaries previously published and sold by your orator or its predecessors and for the purpose of further assurance and guarantee to the public and to all purchasers, sellers and users of Dictionaries in general that said Dictionary was prepared, proof read, printed, bound and published by or under the general supervision of the G. & C. Merriam Co., your orator also adopted as its own special trade-name for its said Dictionary aside from its formal title the words "Webster's Counting House and Family Dictionary," or "Webster's Counting House Dictionary," and caused the same to be printed upon the top of the title page

and also to be printed or embossed upon the front cover or upon the back of each of said Dictionaries or upon both.

That by reason of the great skill and care exercised by the said G. & C. Merriam Co. in preparing said book, the same became known to the trade and to the public in general by its cover or outside title of Webster's Counting House Dictionary, and said cover or outside title became a guarantee of the accuracy of the said book, and a guarantee that the same had been prepared by your orator exclusively, and by its said cover or outside title of Webster's Counting House Dictionary the same was described in all printed catalogues, accounts, statements and advertisements and in all correspondence held by said firm with the public in general and became known by said name Webster's Counting House Dictionary by all persons desiring to purchase, sell or use such a Dictionary as the book of your orator, the said G. & C. Merriam Co. exclusively.

SEVENTH. Your orator further shows unto your Honors that on or about the year 1898 said G. & C. Merriam Co. caused to be prepared and printed and published a certain other Dictionary of the English Language, the title of which was set forth on the title page thereof as follows, to wit :

" A Dictionary of the English Language. Giving the derivations, pronnnciations, definitions and synonyms of a large vocabulary of the words occurring in Literature, Art, Science, and the common speech, with an Appendix containing a copious Scotch Glossary, a pronouncing vocabulary of Proper Names, and various useful tables mainly abridged from Webster's International Dictional ; over 1,000 illustrations."

That said Dictionary was copyrighted according to the laws of the United States in the year 1898 by said G. & C. Merriam Co., and for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with the Dictionaries previously published and sold by your orator or its predecessors and for the purpose of further assurance and guarantee to the

public and to all purchasers, sellers and users of Dictionaries in general that said Dictionary was prepared, proof read, printed, bound and published by or under the general supervision of the said G. & C. Merriam Co., your orator also adopted as its own special trade-name for its said Dictionary, aside from its formal title, the words Webster's Collegiate Dictionary and caused the same to be printed upon the top of the title page and also to be printed or embossed upon the front cover or upon the back of each of said Dictionaries or upon both.

That by reason of the great care and skill exercised by the said G. & C. Merriam Co. in preparing said book, the same became known to the trade and to the public in general by its cover or outside title of Webster's Collegiate Dictionary, and said cover or outside title became a guarantee of the accuracy of the said book, and a guarantee that the same had been prepared by the said G. & C. Merriam Co. exclusively, and by its said cover or outside title of Webster's Collegiate Dictionary the same was described in all printed catalogues, accounts, statements and advertisements and in all correspondence held by said firm with the public in general and became known by said name Webster's Collegiate Dictionary by all people desiring to purchase, sell or use such a Dictionary as the book of your orator, the said G. & C. Merriam Co., exclusively.

EIGHTH. Your orator further shows unto your Honors that on or about the year 1900 said G. & C. Merriam Co. caused to be prepared and printed and published a certain other Dictionary of the English Language, the title of which was set forth on the title page thereof as follows, to wit :

"New Edition with Supplement of New Words. Webster's International Dictionary of the English Language, being the authentic Edition of Webster's Unabridged Dictionary, comprising the issues of 1864, 1879 and 1884. Thoroughly revised and much enlarged under the supervision of Noah Porter, D.D., LL.D. With a voluminous appendix to which is now added a Supplement of 25,000 words and phrases. W. T. Harris, Ph.D., LL.D., editor in chief."

That said Dictionary was copyrighted according to the laws of the United States in the year 1900, by said G. & C. Merriam Co.

That the name "Webster" was embodied in the title and printed or embossed upon the front cover and upon the back of each of said dictionaries in addition to the words "International Dictionary," for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with said Dictionaries of the years 1828, 1841, 1847, 1859, 1864, 1879, 1882, 1884, and 1890, and for the purpose of further assurance and guarantee to the public and to all purchasers, sellers and users of Dictionaries in general that said Webster's International Dictionary was prepared, proof read, printed, bound and published by or under the general supervision of said G. & C. Merriam Co., and the words "Webster's Dictionary" either with or without the word "International" became the trade-name and distinguishing mark of said Dictionary.

That by reason of the great care and skill exercised by the said G. & C. Merriam Co. in preparing said book and placing same upon the market, the same became known to the trade and to the public in general by its cover or outside title of Webster's International Dictionary, but more commonly by the name Webster's Dictionary, said word International being used merely to distinguish said Dictionary from the earlier editions thereof, and said word Webster became a guarantee of the accuracy of said book, and a guarantee that the same had been prepared by the said G. & C. Merriam Co. exclusively, and said word Webster was used in describing said book in all printed catalogues, accounts, statements, and advertisements, and in all correspondence held by said company with the public in general, and said book became known by said name Webster's Dictionary or Webster's International Dictionary, by all people desiring to purchase and use such a Dictionary, and by said name was cited as an authority by the courts of law and Judges thereof, as the book of the said G. & C. Merriam Co. exclusively.

NINTH. Your orator further shows unto your Honors that on or about the year 1900, said G. & C. Merriam Co. caused to be prepared and printed and published a certain other Dic-

tionary of the English Language, the title of which was set forth on the title page thereof as follows, to wit :

"Reference History Edition. Webster's International Dictionary of the English Language. Being the Authentic edition of Webster's Unabridged Dictionary, comprising the issues of 1864, 1869 and 1884. Thoroughly revised and much enlarged under the supervision of Noah Porter, D.D., LL.D. With a voluminous appendix and reference history to which is now added a Supplement of 25,000 words and phrases. W. T. Harris, Ph.D., LL.D., Editor in Chief."

That said Dictionary was copyrighted according to the laws of the United States in the year 1900 by said G. & C. Merriam Co.

That the name "Webster" was embodied in the title and printed or embossed upon the front cover and upon the back of each of said Dictionaries in addition to the words "International Dictionary," for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with said Dictionaries of the years 1828, 1841, 1847, 1864, 1879, 1882, 1884, 1890 and 1900, and for the purpose of further assurances and guarantee to the public and to all purchasers, sellers and users of Dictionaries in general that said Webster's International Dictionary was prepared, proof read, printed, bound and published by or under the general supervision of the said G. & C. Merriam Co., and the words "Webster's Dictionary" either with or without the word "International" became the trade-name and distinguishing mark of said Dictionary.

That by reason of the great care and skill exercised by the said G. & C. Merriam Co. in preparing said book and placing same upon the market, the same became known to the trade and to the public in general by its cover or outside title of Webster's International Dictionary, but more commonly by the name Webster's Dictionary, said word International being used merely to distinguish said Dictionary from the earlier editions thereof, and said word Webster became a guarantee of the accuracy of said book, and a guarantee that the same had been prepared by the said G. & C. Merriam Co.

exclusively, and said word Webster was used in describing said book in all printed catalogues, accounts, statements and advertisements, and in all correspondence held by said Company with the public in general, and said book became known by said name Webster's Dictionary or Webster's International Dictionary, by all people desiring to purchase and use such a Dictionary, and by said name was cited as an authority by courts of law and Judges thereof, as the book of the said G. & C. Merriam Co. exclusively.

TENTH. And your orator further shows that whenever the original copyright of the several dictionaries of your orator or its several predecessors was about to expire, the persons lawfully entitled to a renewal of said respective copyrights, duly renewed said several copyrights respectively, according to the Revised Statutes of the United States in such case made and provided, and thereupon duly assigned said several renewed copyrights to your orator or to such of its said predecessors as was then lawfully entitled to print, publish and sell said books respectively as the owner of the original copyright thereof.

IV.

And your orator further shows that the Dictionaries prepared and published by your orator or its predecessors, as hereinbefore set forth, comprise two separate series, viz., a series of unabridged or exhaustive Dictionaries, and a series of smaller Dictionaries abridged from the unabridged edition and designed for special uses or for use by particular classes of persons.

Said series of unabridged Dictionaries is composed of the Compendious Dictionary of the year 1806, and the successive editions of the American Dictionary published, as hereinbefore set forth, in the years 1828, 1840, 1847, 1859, 1864, 1879, 1882, 1884, 1890 and 1900. The Dictionary of each of said years (except the first) was a new and revised edition of the last preceding edition of said Dictionary and upon the publication of each of said successive editions the prior edition of said Dictionary was substantially withdrawn from the market, and thereafter the last edition of said Dictionary alone was known

among the trade and by purchasers and users of said Dictionary as Webster's Dictionary, and all previous editions of said Dictionary were supplanted and made obsolete by said successive new editions, and thereafter no copies of said earlier and obsolete editions were printed or sold by your orator or its predecessors, except to a limited extent and upon special orders calling for copies of a particular edition, and with this exception, no copies of said earlier editions could be purchased except as second-hand books, in consequence whereof the name Webster as applied to dictionaries has always been understood by the trade and by purchasers and users of said dictionaries to mean the latest edition of said dictionaries published by your orator or its predecessors.

The various dictionaries constituting said series of abridged Dictionaries published by your orator or its predecessors, as hereinbefore set forth, were revised and new editions thereof were published from time to time, whereupon the previous editions of said several Dictionaries respectively were substantially withdrawn from the market, and thereafter the latest editions of said Dictionaries alone were known among the trade and by purchasers and users of said dictionaries as Webster's Dictionaries, and all previous editions of said dictionaries were supplanted and made obsolete by said successive new editions, and thereafter no copies of said earlier and obsolete editions were printed or sold by your orator or its predecessors, and none could be purchased except as second-hand books, in consequence whereof the name Webster as applied to dictionaries has always been understood by the purchasers and users of said dictionaries to mean the latest editions of said dictionaries published by your orator or its predecessors.

Your orator further shows unto your Honors that on or about the year 1903 said G. & C. Merriam Co. caused to be prepared and printed and published a certain other Dictionary of the English Language, the title of which was set forth on the title page thereof as follows, to wit :

"An American Dictionary of the English Language by Noah Webster, LL.D. Thoroughly revised and greatly enlarged and improved by Chauncey A. Goodrich, D.D., late Professor in Yale College, and Noah Porter, D.D., LL.D., President of Yale College. With an Ap-

pendix of useful tables including recent population statistics of the World and a supplement of more than Five Thousand Words and Phrases."

That said Dictionary was copyrighted according to the laws of the United States in the year 1903 by said G. & C. Merriam Co., and for the purpose of indicating to the public the authority and source of said Dictionary and said Dictionary's relation to and connection with said Dictionaries of your orator and its predecessors, and for the purpose of further assurance and guarantee to the public and to all purchasers, sellers and users of Dictionaries in general that said Dictionary was prepared, proof read, printed, bound and published by or under the general supervision of the said G. & C. Merriam Co., said Company adopted as their own special trade-name for said Dictionary aside from its formal title the words Webster's Unabridged Dictionary, and caused the same to be printed upon the top of the title page and also printed or embossed upon the front cover and upon the back of each of said Dictionaries.

That by reason of the great care and skill exercised by the said G. & C. Merriam Co. in preparing said book, the same became known to the trade and to the public in general by its cover or outside title of Webster's Unabridged Dictionary, but more commonly by the name Webster's Dictionary, said word "Unabridged" being used merely to distinguish said edition from the International edition of said Webster's Dictionary, and said cover or outside title became a guarantee of the accuracy of the said book, and a guarantee that the same had been prepared by the said G. & C. Merriam Co. exclusively, and by the said name of Webster's Unabridged Dictionary the same was described in all printed catalogues, accounts, statements and advertisements and in all correspondence held by said Company with the public in general and became known by said name Webster's Dictionary or Webster's Unabridged Dictionary by all people desiring to purchase and use such a Dictionary as the book of the said G. & C. Merriam Co. exclusively.

That said Dictionary was a new edition of the aforesaid Dictionary of 1879 and was designed and put upon the market for the purpose of supplying the demand for a modern low-

priced genuine Webster Dictionary, and not as a new and later edition of said Webster's International Dictionary, and both said Webster's Unabridged Dictionary and said Webster's International Dictionary are now being offered for sale and sold by your orator by their said respective names or titles.

Your orator further shows unto your Honors that in or about the year 1909, said G. & C. Merriam Co. caused to be prepared, and printed and published a certain other dictionary of the English Language, and title of which was set forth on the title page thereof, as follows :

" Webster's New International Dictionary of the English Language, based on the International Dictionary of 1890 and 1900. Now completely revised in all departments, including also a Dictionary of geography, and of biography, being the latest authentic quarto edition of the Merriam Series. W. T. Harris, Ph. D., LL.D., Editor in Chief, F. Sturgis Allen, General Editor."

That said Dictionary was duly copyrighted according to the laws of the United States, in the year 1909 by said G. & C. Merriam Co.

That the name " Webster's " was embodied in the title and printed or embossed upon the front cover and back of each of said Dictionaries in addition to the words " New International Dictionary," for the purpose of indicating to the public the authority and source of said Dictionary, and said Dictionary's relation to and connection with said Dictionaries of the years 1828, 1841, 1847, 1859, 1864, 1879, 1882, 1884, 1890, and 1900, and for the purpose of further assurance and guarantee to the public and to all purchasers, sellers and users of Dictionaries in general that said " Webster's New International Dictionary " was prepared, proof read, printed, bound and published by or under the general supervision of the said G. & C. Merriam Co., and the words " Webster's Dictionary," either with or without the words " New " and " International " became and are the trade-name and distinguishing mark of said Dictionary.

That by reason of the great care and skill exercised by said G. & C. Merriam Co., in preparing said book, and placing

same upon the market, the same became known to the trade and to the public in general, by its cover or outside title of "Webster's New International Dictionary." Said words, "New International," being used merely to distinguish said Dictionary from the earlier edition thereof, and said word "Webster" became a guarantee of the accuracy of said book, and a guarantee that the same had been prepared by the said G. & C. Merriam Co. exclusively, and said word "Webster" was used in describing said book in all printed catalogues, accounts, statements and advertisements, and in all correspondence held by your orator with the public in general, and said book became known as "Webster's Dictionary" by all people desiring to purchase and use such a Dictionary, and by said name was cited as an authority by courts of law and Judges thereof as the book of G. & C. Merriam Co. exclusively.

V.

FIRST. And your orator further shows that in obtaining the necessary skill in preparing the manuscript of said Dictionaries, and in preparing the electrotype plates from which said Dictionaries have been printed, and in printing, binding and publishing and advertising said Dictionaries, said firm of G. & C. Merriam and said firm of G. & C. Merriam & Co. and your orator have expended very large sums of money, to wit, many hundreds of thousands of dollars.

That for more than fifty years last past your orator or its predecessors have continuously and without interruption had upon the market and have offered for sale and sold Dictionaries of the English Language prepared or caused to be prepared as to their literary matter by your orator or its predecessors or one of them upon principles first enunciated by said Noah Webster, and continually enlarged, expanded and amplified by educated and learned professors and editors or their assistants, and typeset, electrotyped, proof read, printed, bound and published by skilled mechanics and artisans, all under the general charge and direction and at the expense of your orator or its said predecessors or one of them, each and all of which said Dictionaries have borne the title

and have been known and described and recognized by the public as the work of your orator or its said predecessors or one of them by their said trade-name or title of Webster's Dictionaries, and that your orator and its said predecessors have at all times and under all circumstances and by all means in their power maintained, asserted and insisted upon their exclusive right to the word Webster as their special trade-name as applied to Dictionaries of the English Language.

VI.

That by reason of the long continued use by your orator and by its predecessors under whom it rightfully claims, and also by reason of the acquiescence of the public in general it has come to be understood and believed by the people and the public, especially by retail dealers and buyers and sellers of Dictionaries that all Dictionaries bearing the name of Webster's either with or in combination with other titles or names are the literary and mechanical production of your orator, and by reason thereof, and by reason of the literary and mechanical skill, industry and enterprise of the said G. & C. Merriam and the said G. & C. Merriam & Co. and of your orator and of their several and respective editors and mechanics in producing said Dictionaries as well in their literary as in their mechanical construction and in advertising and calling the attention of the public to the same, a large demand has been created for its said Dictionaries by said trade-name of Webster's Dictionaries and by which said name the same have been and now are associated in the minds of the public and of purchasers, dealers in and users of Dictionaries with that of said G. & C. Merriam or G. & C. Merriam & Co. or your orator as the makers thereof, and is the genuine trade-name of your orator or its predecessors as aforesaid, and has been for upwards of fifty years and is now recognized and acquiesced in as such by the public generally and by dealers in and users of Dictionaries as indicating to the public and to said dealers and users the origin of said Dictionaries, and that they are your orators' production and manufacture and have the superior quality of your orator for which the same has become well known and distinguished by

the public; and thereby your orator has acquired for itself a large and lucrative trade as well in the United States as also in all parts of the world where the English Language is either used or studied, from which large and increasing profits are accruing and are likely to accrue except for the wrongful acts of the defendant and others conspiring with it as hereinafter set forth.

VII.

Your orator further shows, on information and belief, that defendant, well knowing the premises, and intending to injure and defraud your orator and to deprive it of making sales of your orator's said dictionaries or some of them, and intending to impose upon and defraud the public in general, by inducing the public to believe that they were purchasing or could purchase from the defendant, dictionaries which had been prepared by or under the general supervision of said G. & C. Merriam or said G. & C. Merriam & Co., or one of them, or your orator, or its corps of authors, editors and compilers, and which had been type set, electrotyped, printed, corrected, bound and published by said firms or one of them, or by your orator, at a much less rate than your orator's uniform charge therefor, since the first day of January, 1911, and before the beginning of this suit, against the will of your orator and in defiance of its rights, has offered for sale and sold, and has offered inducements to the public to make purchases of, and to order from it dictionaries described as follows, to wit:

Dictionaries bearing both upon the title page, and upon the front cover and back thereof, or upon one of them, the title "Webster's New Standard Dictionary," in manner and form, and in imitation of the titles and words stamped or printed upon your orator's said dictionaries, and in such manner that said dictionaries resemble Dictionaries belonging to your orator's said series of Dictionaries, and might readily be mistaken therefor, or for a later and succeeding edition thereof, by purchasers and users of Dictionaries, and by the public in general, a copy of which said Dictionary is filed herewith as an exhibit, and marked, "Complainant's Exhibit, Defendant's Dictionary."

And your orator further shows that said Dictionaries of defendant are not the product, either literary or mechanical, of your orator, or of any of its said predecessors, or of its said corps of editors, authors, or compilers, or any of them, and that said Dictionaries do not belong to either of said series of Abridged and Unabridged Dictionaries of your orator.

And your orator further shows that the use of the name "Webster's" as the designating title and description of defendant's said Dictionaries is unnecessary, false, and deceptive in every sense of the term; that Webster is not the author of said Dictionaries; that said dictionaries are not copies or reproductions of any Dictionary which has ever, at any time, borne the name or been described as a "Webster" Dictionary; that said Dictionaries are not copies or reproductions of any of your orator's said Dictionaries, which are copyrighted, owned, and published by your orator exclusively, and are the Dictionaries now known as "Webster's" Dictionaries; that by reason of the said false and deceptive use of the name "Webster's," as the designating title and description of defendant's said book, your orator is informed and believes, and so charges the fact to be, the public have been and are likely to be deceived and led to purchase one or more of defendant's said Dictionaries in the belief that it is one of the hereinbefore described Dictionaries of your orator, or that it is an edition, or the latest edition of one of the said series of dictionaries of your orator, and upon information and belief, many purchasers have actually been thus deceived.

And your orator further shows that in the prosecution of its said fraudulent purpose, defendant purchased or otherwise acquired the plates of a certain old dictionary published and copyrighted in to wit, the year 1904, under the name and title of "The Crown Dictionary," and thereupon defendant changed the name or title thereof, and dropped the words "Crown Dictionary," and substituted in lieu thereof the words "Webster's New Standard Dictionary," and in order to make it appear that its said Dictionary was a new production, defendant also omitted the former copyright notice which contained the date "1904," and substituted in lieu thereof a new copyright notice bearing the date "1911," and also placed in the publisher's imprint at the foot of the title page the date 1911;

that the purpose and effect of these changes was to conceal the true origin and identity of defendant's said Dictionary, and to lead purchasers and the public in general to buy defendant's said Dictionary in the belief that it is a new Dictionary first published in the year 1911, and that it is one of your orator's said series of "Webster's" Dictionaries, or a later or the latest edition thereof, whereas the true fact is that defendant's said Dictionary is a republication of said old "Crown Dictionary," and is printed from the same plates, or duplicates thereof, except as to a small amount of prefatory and supplemental matter, having no relation to the vocabulary or dictionary proper.

And your orator further shows that defendant's said Dictionaries have been widely advertised and announced under the designating name and description of "Webster's Dictionary" and "Webster's New Standard Dictionary," which said advertisements and announcements are false, ambiguous and misleading, and tend to deceive the public, and to pass off defendant's said Dictionaries as and for the Dictionaries of your orator.

And your orator further shows, upon information and belief, that said defendant purposes and threatens to continue to sell and offer for sale its said dictionaries entitled and marked as aforesaid, and to continue to publish and circulate said notices and advertisements in manner and form as aforesaid, and to publish and circulate other similar or equally misleading and damaging notices and advertisements, and is thereby threatening to cause, and is now causing, and necessarily will continue to cause your orator great loss in its said trade; and that purchasers have actually been deceived into buying one or more of the above-entitled books of defendant as and for the genuine book of your orator, or as and for an edition or the latest edition of one of the series of dictionaries published by your orator and its predecessors, as hereinbefore set forth; and that your orator's business and reputation has also been and is likely to be further injured because the Dictionaries so made and sold by defendant are defective and of an inferior quality, both in their literary as well as in their mechanical construction, by reason whereof the long established and well-earned reputation of your orator in those regards has been and

is likely to be greatly and permanently damaged, to-wit: in the sum of Five Thousand Dollars and upwards.

All in defiance of the rights acquired by and secured to your orator as aforesaid, and to its great and irreparable loss and injury, and by which it has been and is still being and necessarily will be deprived of great gains and profits which it might and otherwise would have obtained, but which have been received and enjoyed, and are being received and enjoyed by said defendant by and through the aforesaid unlawful acts and doings.

VIII.

And you orator further shows unto your Honors that the value of the exclusive right in your orator to use and employ said word "Webster's" as the whole or a part of the title of said Dictionaries or either of them, and to use the same in publishing, selling and advertising for sale and in marketing said Dictionaries or either of them, exceeds exclusive of interest and costs, the sum of Fifty thousand dollars, and that the damage inflicted upon your orator by reason of the wrongful conduct of the defendant as hereinbefore stated exceeds the sum of Five thousand dollars exclusive of interest and costs, and that the matter in dispute between your orator and the defendant; exceeds exclusive of interest and costs said sum or value of Five thousand dollars.

And your orator further shows unto your Honors, on information and belief, that said defendant has printed or caused to be printed and sold large numbers of said Dictionaries and has large quantities on hand, which it is now offering for sale and is purposing to continue to offer for sale, and has made and realized considerable profits and advantage therefrom, but to what extent and how much exactly, your orator does not know, and prays discovery thereof. And your orator says that the publication and sale of said Dictionaries by said defendant and its preparation for and avowed determination to continue the same, in disregard and defiance of the rights of your orator have the effect to and do encourage and induce others to do the same.

IX.

And forasmuch as your orator can have no adequate relief except in this Court, to the end, therefore, that the said defendant may, if it can, show why your orator should not have the relief hereby prayed, and may according to its best and utmost knowledge, remembrance, information and belief, full, true, direct and perfect answers make to the premises, and to all the several matters hereinbefore stated and charged as well as those in regard to which it is herein severally and separately interrogated as also the matters hereinbefore stated in general, but not under oath, the oath being hereby specifically waived, and to account for and pay to your orator the profits by it acquired, and the damages suffered by your orator from the aforesaid unlawful acts ;

And that said defendant, its agents, servants, attorneys, and workmen, and each and every of them, be restrained and enjoined provisionally and perpetually by the order and injunction of this Honorable Court from directly or indirectly using the word " Webster's," either alone or in association with any other word, in connection with the publication and sale of its said dictionaries, as the name of, or as descriptive of, such dictionaries, or in any other manner without clearly distinguishing such dictionaries from the dictionaries of your orator, and especially from selling and offering for sale its said dictionaries under the name or title of " Webster's " New Standard Dictionary," and from publishing and circulating any notices or advertisements wherein its said dictionaries are designated by a name or title in which the word Webster or Webster's appears, either alone or in connection with other words or any other notices or advertisements in such manner and form that the natural and probable tendency and effect thereof will be to deceive and mislead the public into purchasing said dictionaries as and for the genuine dictionaries of your orator, or as and for an edition of, or the latest edition of either of the said series of dictionaries published by your orator and its predecessors as aforesaid and that the defendant may be decreed to pay the cost of this suit ; and that your orator may have such further relief, or such

other relief, as to this Honorable Court shall seem meet, and as shall be agreeable to equity.

May it please your Honor to grant unto your orator the writ of injunction, as well provisional as perpetual, issuing out of and under the seal of this Honorable Court, commanding, enjoining and restraining the said defendant, and its servants, agents, attorneys and workmen, and each and every of them, as is hereinbefore in that behalf prayed.

May it please your Honors to grant your orator the writ of subpœna, issuing out of and under the seal of this Honorable Court, directed to the said defendant the Syndicate Publishing Company commanding it by a certain day, and under a certain penalty, to be and appear in this Honorable Court, then and there to answer the premises, and to stand to and abide such order and decree as may be made against it.

And your orator will ever pray, &c.

JUDSON & HALE,

Complainant's Solicitors.

WILLIAM B. HALE,

Of Counsel.

The defendant is required to answer the interrogatories hereto annexed marked 1 and 2.

JUDSON & HALE,

Complainant's Solicitors.

INTERROGATORIES.

1. Whether or not the defendant, or its agents or servants, or one of them, have since the first day of January, 1911, offered for sale or sold one or more copies of said dictionaries hereinbefore described, entitled "Webster's New Standard Dictionary," either with or without other words, the Dictionaries in question being those a copy of which is filed as an exhibit herein marked: "Complainant's Exhibit, Defendant's Dictionary?"

2. How many of said Dictionaries have been sold by said defendant and how many has it now on hand?

UNITED STATES OF AMERICA, }
 State of Massachusetts, } ss. :
 COUNTY OF HAMPDEN, }

On this 8th day of Nov., 1911, before me personally appeared Orlando M. Baker, to me known to be the President of G. & C. Merriam Co., complainant above named, who, being by me duly sworn, deposes and says that he is the President of the complainant herein. That he has read the foregoing Bill of Complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. That the reason why this verification is not made by the complainant is that said complainant is a corporation of which this affiant is an officer, to wit, the President.

ORLANDO M. BAKER.

Sworn to before me this 8th }
 day of Nov., 1911. }

CHARLES S. CLEAVES,

[SEAL]

Notary Public,

Springfield, Mass.

(County Clerk's certificate.)

"B."

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

G. & C. MERRIAM COMPANY, a Cor-
poration,
Complainant,

vs.

SYNDICATE PUBLISHING COMPANY, a
Corporation,
Defendant.

Amendment to bill.

Now comes the complaint in the above entitled cause, and amends its bill of complaint herein, as follows, to wit :

FIRST. Insert at the end of subdivision No. VI., at the foot of page 21 of the bill of complaint as filed herein, the following new matter :

And your orator further shows that by reason of the use aforesaid, the name " Webster's " has become, and now is the genuine trade-mark of your orator, for its said dictionaries, and that at the time of the adoption of said trade-mark by your orator's said predecessors, as hereinbefore set forth, no other person, firm or corporation engaged in the manufacture, publication or sale of dictionaries was using the said word " Webster's " as a trade-mark or as a designation to designate their goods from those of others, to the best of your orator's knowledge, information and belief, and that your orator, and its said predecessors had the legal right to appropriate and use said word " Webster's " as a lawful trade-mark for its said dictionaries.

And your orator further shows that heretofore, and prior to the time of the committing of the grievances by defendant hereinafter complained of, and for the better protection of

the trade and good-will of your orator in its said dictionaries, your orator adopted and used, and is now using certain trade-marks consisting of the word "Webster's" in combination and association with other words or features, which said trade-marks your orator caused to be duly registered in the Patent Office of the United States, in accordance with the statute in such case made and provided, as follows, to wit :

On September 23rd, 1890, a trade-mark consisting of the words "Webster's International Dictionary," surrounded by a circle, and surmounted by a monogram enclosed in a wreath, a Patent Office copy of which is hereto annexed, and marked, "Complainant's Exhibit, Registered Trade-mark No. 1."

On March 26, 1895, a trade-mark consisting of the word "Webster's" surrounded by a circle, and surmounted by a monogram, enclosed in a wreath, a Patent Office copy of which is hereto annexed, and marked, "Complainant's Exhibit, Registered Trade-mark No. 2."

On January 1, 1907, a trade-mark consisting of the words "Webster's Academic," a Patent Office copy of which is hereto annexed, and marked, "Complainant's Exhibit, Registered Trade-Mark No. 3."

On January 1, 1907, a trade-mark consisting of the words "Webster's Common School," a Patent Office copy of which is hereto annexed, and marked, "Complainant's Exhibit, Registered Trade-mark No. 4."

On January 1, 1907, a trade-mark consisting of the words "Webster's Practical," a Patent Office copy of which is hereto annexed, and marked "Complainant's Exhibit, Registered Trade-mark No. 5."

On January 1, 1907, a trade-mark consisting of the words "Webster's High School," a Patent Office copy of which is hereto annexed, and marked, "Complainant's Exhibit, Registered Trade-mark No. 6."

On January 1, 1907, a trade-mark consisting of the words "Webster's Condensed," a Patent Office copy of which is hereto annexed, and marked, "Complainant's Exhibit, Registered Trade-mark No. 7."

On January 8, 1907, a trade-mark consisting of the words "Webster's National Pictorial," a Patent Office copy of which

is hereto annexed, and marked, "Complainant's Exhibit, Registered Trade-mark No. 8."

On January 1, 1907, a trade-mark consisting of the words "Webster's Primary," a Patent Office copy of which is hereto annexed, and marked "Complainant's Exhibit, Registered Trade-mark No. 9."

On January 1, 1907, a trade-mark consisting of the words, "Webster's Counting House and Family," a Patent Office copy of which is hereto annexed, and marked "Complainant's Exhibit, Registered Trade-mark No. 10."

All of which will more fully and at large appear by certificates of said registrations, or copies thereof, duly certified by the Patent Office and here in court to be produced.

SECOND. Insert in said bill, at the foot of page 25 thereof, and immediately after the words, "to pass off defendant's said dictionaries as and for the dictionaries of your orator," the following new matter, to wit:

And your orator further shows that defendant has unlawfully and in violation of our orator's rights, as aforesaid, appropriated, used, and imitated your orator's said trade-marks upon its said dictionaries, and that defendant has done this by printing, stamping or otherwise affixing to its said dictionaries the word "Webster's" in a manner closely imitating your orator's said registered trade-marks or one of them, and which might be readily mistaken therefor by purchasers and the public in general, and the natural and probable tendency and effect of which is to deceive the public, and to pass off defendant's said dictionaries as and for the dictionaries of your orator."

THIRD. Insert in the prayer for relief, in paragraph No. IX, of said bill, at about the middle of page 27 thereof, and immediately following the words, "Webster's New Standard Dictionary," the following words, to wit:

And from in any manner copying, imitating, or infringing any of your orator's said registered trade-marks.

Dated New York, November 27, 1911.

JUDSON & HALE,

Solicitor for Complainant.

WILLIAM B. HALE,

Counsel for Complainant.

UNITED STATES OF AMERICA, }
 State of Massachusetts, } ss. :
 COUNTY OF HAMPDEN, }

ORLANDO M. BAKER, being first duly sworn, deposes and says : I am the President of G. & C. Merriam Company, the complainant above named. I have read the foregoing amendment to the bill of complaint herein, and know the contents thereof, and the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters, I believe it to be true. The reason why this verification is not made by the complainant, is that said complainant is a corporation, and not capable of making this affidavit.

ORLANDO M. BAKER.

Subscribed and sworn to be- }
 fore me this 27 of Novem- }
 ber, 1911.

[SEAL] CHARLES S. CLEAVES,
 Notary Public,
 Springfield,
 Mass.

TRADE-MARK.

G. & C. MERRIAM & CO.
DICTIONARIES.

No. 18,449.

Registered Sept. 23, 1890.

(Complainant's Exhibit,
Registered Trade-Mark No. 1)



WEBSTER'S
INTERNATIONAL
DICTIONARY

UNITED STATES PATENT OFFICE.

G. & C. MERRIAM & CO., OF SPRINGFIELD, MASSACHUSETTS.

TRADE-MARK FOR DICTIONARIES.

STATEMENT and DECLARATION of Trade-Mark No. 18,449, registered September 23, 1890.

Application filed August 15, 1890.

STATEMENT.

To all whom it may concern:

Be it known that we, G. & C. MERRIAM & Co., a firm domiciled and having an office and place of business in the city of Springfield, in the county of Hampden and State of Massachusetts, and composed of HOMER MERRIAM, GEORGE S. MERRIAM, ORLANDO M. BAKER, and H. CURTIS ROWLEY, residing at and citizens of said city of Springfield; BIRDSEYE BLAKEMAN and GEORGE R. CATHCART, residing at and citizens of the city, county, and State of New York; HENRY IVISON and DAVID B. IVISON, residing at and citizens of Rutherford, county of Bergen, and State of New Jersey, and L. HENRY BLAKEMAN, residing at and a citizen of Orange in the county of Essex and State of New Jersey, have adopted for our use a Trade-Mark for books, more especially Dictionaries, of which the following is a full, clear, and exact description.

Our trade-mark consists of an interwoven script cipher composed of the capital letters "N" and "W" partially surrounded by a wreath of flowers, leaves, or the like, the whole surmounting the words "Webster's International Dictionary." These have generally been arranged as shown in the accompanying fac-simile—i. e., in the form of a medallion upon the upper face of which is printed or embossed said interwoven script cipher "N

"W," said cipher being partially surrounded by a wreath of flowers or leaves, beneath which are the letters and words "Webster's International Dictionary," and the whole being placed within a circle, so as to form a medallion, all the other parts of said trade-mark, except the interwoven cipher "N W" and the words "WEBSTER'S INTERNATIONAL," which are essential features, being changeable at pleasure at our option without materially altering the character of our trade-mark.

This trade-mark in its entirety has been used continually in business by us since July 31, 1890.

The class of merchandise to which this trade-mark is appropriated is books, and the particular description of books comprised in such class on which it is used by us is dictionaries.

It has been our practice to stamp or print our said trade-mark on the title-page of the dictionaries and to stamp or emboss the same upon the outside or cover thereof, and also to print the same upon the outside of parcels containing said dictionaries, or to print the same upon tags or labels, which are secured to the goods in any desired manner.

G. & C. MERRIAM & CO.

Witnesses:

CHAS. S. CLEAVES,
A. G. BAKER.

DECLARATION.

State of Massachusetts, county of Hampden,
ss:

ORLANDO M. BAKER, being duly sworn, deposes and says that he is a member of the firm the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that the said firm at this time has a right to the use of the trade-mark therein described; that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to

deceive; that the trade-mark is used by the said firm in commerce between the United States and foreign nations, and particularly with England, and that the description and fac-similes presented for record truly represent the trade-mark sought to be registered.

ORLANDO M. BAKER.

Sworn and subscribed before me, a notary public, this 7th day of August, 1890.

[L. S.]

EDWARD MORRIS,
Notary Public.

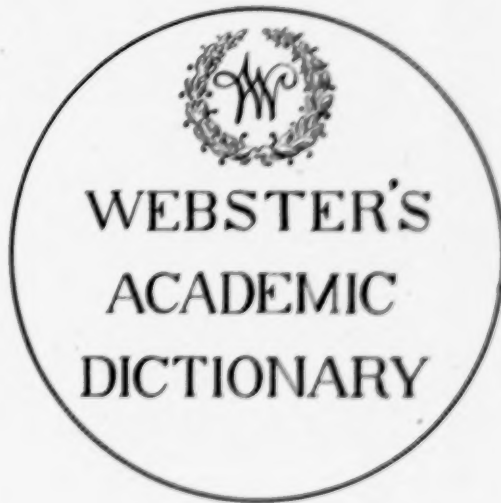
TRADE-MARK.

G. & C. MERRIAM COMPANY.
EDUCATIONAL BOOKS.

No. 26,273.

Registered Mar. 26, 1895.

(Complainant's Exhibit
Registered Trade-Mark No. 2)



WITNESSES:

Frank S. Ober
A. H. Hayes

PROPRIETOR:

G. & C. Merriam Company
BY
Charles F. Judson
ATTORNEY

UNITED STATES PATENT OFFICE.

G. & C. MERRIAM COMPANY, OF SPRINGFIELD, MASSACHUSETTS.

TRADE-MARK FOR EDUCATIONAL BOOKS.

STATEMENT and DECLARATION of Trade-Mark No. 28,273, registered March 26, 1895.

Application filed February 21, 1895.

STATEMENT.

To all whom it may concern:

Be it known that the G. & C. MERRIAM COMPANY, a corporation organized under the laws of Massachusetts, and located in the city of Springfield, county of Hampden, and State of Massachusetts, has adopted for its use a Trade-Mark for Books, of which the following is a full, clear, and exact specification.

The said trade-mark consists in a monogram composed of the capital letters "N" and "W" together with the word "Webster's." These have generally been arranged as shown in the accompanying fac-simile; i. e., in the form of a medallion, upon the face of which is printed or embossed said monogram composed of the interwoven script letters "N W" partially surrounded by a wreath of flowers or leaves beneath which is the word "Webster's" together with such other word or words as may indicate the character of the book upon which it is placed, the whole being placed within a circle so as to produce in general effect the medallion-like appearance. These features are all shown in black in the accompanying drawing but any other design or color may be used or the different features may be differently colored or all or part of the non-essential features may be omitted or changed at pleasure and the mark may be used in conjunction with other matter with-

out materially affecting the character of the trade-mark, the essential features of which are the monogram composed of the letters "N" and "W" together with the word "WEBSTER'S."

This trade-mark in its entirety has been used continuously in business by said company since October, 1890.

The class of merchandise to which this trade-mark is appropriated is books and the particular description of books comprised in such class on which it is used by said company is educational books.

It has been the practice of said company to stamp or print its said trade-mark on the title page of the books and to stamp or emboss the same upon the outside or cover thereof, and also to print the same upon the outside of parcels containing said books or to print the same upon tags or labels.

[L. S.] G. & C. MERRIAM CO.,
By O. M. BAKER,
Treasurer.

Approved: HOMER MERRIAM,
President.

Witnesses:
THOS. H. STOCK,
A. G. BAKER.

DECLARATION.

State of Massachusetts, county of Hampden.

ss:

ORLANDO M. BAKER being duly sworn, deposes and says that he is the treasurer of the corporation named in the foregoing statement; that he verily believes that the foregoing statement is true; that said corporation has at this time a right to the use of the trade-mark therein described; that no other person, firm or corporation has a right to such use either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that it is used by said corporation

in commerce between the United States and foreign nations or Indian tribes and particularly with the Dominion of Canada and the Hawaiian Islands and Great Britain, and that the description and fac-similes presented for record truly represent the trade-mark sought to be registered.

ORLANDO M. BAKER.

Sworn to and subscribed before me, a notary public, this 13th day of February, 1895.

[L. S.] CHARLES S. CLEAVES,
Notary Public.

TRADE-MARK.

No. 59,188.

REGISTERED JAN. 1, 1907.

G. & C. MERRIAM CO.
DICTIONARIES AND REFERENCE MANUALS.
APPLICATION FILED MAY 11, 1906.

(Complainant's Exhibit,
Registered Trade-Mark No. 3)

WEBSTER'S
ACADEMIC

Proprietor
G. & C. Merriam Co.
by Hall & Hegleman
attys

UNITED STATES PATENT OFFICE.

G. & C. MERRIAM CO., OF SPRINGFIELD, MASSACHUSETTS.

TRADE-MARK FOR DICTIONARIES AND REFERENCE-MANUALS.

No. 59,188.

Statement and Declaration.

Registered Jan. 1, 1907.

Application filed May 11, 1906. Serial No. 19,430.

STATEMENT.

To all whom it may concern:

Be it known that G. & C. MERRIAM Co., a corporation duly organized under the laws of the State of Massachusetts, and having its principal place of business at No. 499 Main street, in the city of Springfield, State of Massachusetts, has adopted for its use the trade-mark shown in the accompanying drawing.

The trade-mark has been continuously used in the business of said corporation since 1892 and in the business of its predecessor since 1867.

The class of merchandise to which the trade-mark is appropriated is Class 68, Publications, and the particular description of goods comprised in said class upon which

said mark is used is dictionaries and reference manuals or combined dictionary and reference-manual.

The trade-mark is usually displayed upon the goods by imprinting or impressing the same directly upon the books and upon the packages in which the books are wrapped.

[L. s.] G. & C. MERRIAM CO.,
By H. C. ROWLEY,
Treasurer.

Approved: O. M. BAKER,
President.

Witnesses:
BERTON E. HALE,
ALBERT BOEDEKER.

DECLARATION.

State of Massachusetts, county of Hampden,
ss:

ORLANDO M. BAKER, being duly sworn, deposes and says that he is the president of the corporation, the applicant named in the foregoing statement, that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief has the right to use said trade-mark either in the identical form or in any such near resemblance thereto which might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States of the

United States; that the description, drawing and facsimiles presented truly represent the mark sought to be registered, and that the mark has been in actual use as a trade-mark of the applicant, or its predecessors from whom it derived title, for ten years next preceding the passage of the act of February 20, 1905, and that to the best of his knowledge and belief such use has been exclusive.

ORLANDO M. BAKER.

Subscribed and sworn to before me, a notary public, this 5th day of May, 1906.

[L. s.] CHAS. S. CLEAVES,
Notary Public.

TRADE-MARK.

No. 59,189.

REGISTERED JAN. 1, 1907.

G. & C. MERRIAM CO.
DICTIONARIES.

APPLICATION FILED MAY 11, 1906.

(Complainant's Exhibit,
Registered Trade-Mark No. 4)

WEBSTER'S
COMMON SCHOOL

Proprietor
G. & C. Merriam Co.
by H. A. H. H. H. H.
at New York.

UNITED STATES PATENT OFFICE.

G. & C. MERRIAM CO., OF SPRINGFIELD, MASSACHUSETTS.

TRADE-MARK FOR DICTIONARIES.

No. 59,189.

Statement and Declaration.

Registered Jan. 1, 1907.

Application filed May 11, 1906. Serial No. 19,432.

STATEMENT.

To all whom it may concern:

Be it known that G & C. MERRIAM CO., a corporation duly organized under the laws of the State of Massachusetts, and having its principal place of business at No. 499 Main street, in the city of Springfield, State of Massachusetts, has adopted for its use the trade-mark shown in the accompanying drawing.

The trade-mark has been continuously used in the business of said corporation since 1892 and in the business of its predecessor since 1867.

The class of merchandise to which the trade-mark is appropriated is Class 68, Publications, and the particular description of

goods comprised in said class upon which said mark is used is dictionaries.

The trade-mark is usually displayed upon the goods by imprinting or impressing the same directly upon the books and upon the packages in which the books are wrapped.

[L. s.] G. & C. MERRIAM CO.,
By H. C. ROWLEY,
Treasurer.

Approved O. M. BAKER,
President.

Witnesses:
BERTON E. HALE,
ALBERT BOEDEKER.

DECLARATION.

State of Massachusetts, county of Hampden,
ss:

ORLANDO M. BAKER, being duly sworn, deposes and says that he is the president of the corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief has the right to use said trade-mark either in the identical form or in any such near resemblance thereto which might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several

States of the United States; that the description, drawing and facsimiles truly represent the mark sought to be registered, and that the mark has been in actual use as a trade-mark of the applicant, or its predecessors from whom it derived title, for ten years next preceding the passage of the act of February 20, 1905, and that to the best of his knowledge and belief such use has been exclusive

ORLANDO M. BAKER.

Subscribed and sworn to before me, a notary public, this 5th day of May, 1906.

[L. s.] CHAS. S. CLEAVES,
Notary Public.

TRADE-MARK.

No. 59,192.

REGISTERED JAN. 1, 1907.

G. & C. MERRIAM CO.
DICTIONARIES AND REFERENCE MANUALS.
APPLICATION FILED MAY 17, 1906.

(Complainant's Exhibit,
Registered Trade-mark No. 5)

WEBSTER'S
PRACTICAL

Proprietor
G. & C. Merriam Co.
by Hall & Heylman
Attys

UNITED STATES PATENT OFFICE.

G. & C. MERRIAM CO., OF SPRINGFIELD, MASSACHUSETTS.

TRADE-MARK FOR DICTIONARIES AND REFERENCE-MANUALS.

No. 59,192.

Statement and Declaration.

Registered Jan. 1, 1907.

Application filed May 17, 1906. Serial No. 18,616.

STATEMENT.

To all whom it may concern:

Be it known that G. & C. MERRIAM CO., a corporation duly organized under the laws of the State of Massachusetts, and having its principal place of business at No. 499 Main street, in the city of Springfield, State of Massachusetts, has adopted for its use the trade-mark shown in the accompanying drawing.

The trade-mark has been continuously used in the business of said corporation since 1892.

The class of merchandise to which the trade-mark is appropriated is Class 68, Publications, and the particular description of goods comprised in said class upon which said mark is used is dictionaries and reference-

manuals or combined dictionary and reference-manuals.

The trade-mark is usually displayed upon the goods by printing or impressing the same directly upon the books and upon the packages in which the books are arranged.

[I. e.] G. & C. MERRIAM CO.,

By H. C. ROWLEY,

Treasurer.

Approved:

O. M. BAKER,

President.

Witnesses:

BERTON E. HALL,

RICHARD S. BETTUS.

DECLARATION.

State of Massachusetts, county of Hampden,
ss:

ORLANDO M. BAKER, being duly sworn, deposes and says that he is the president of the corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade-mark either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States of the

United States; that the description, drawing and facsimiles presented truly represent the mark sought to be registered, and that the mark has been in actual use as a trade-mark of the applicant, or its predecessors from whom it derived title, for ten years next preceding the passage of the act of February 20, 1905, and that to the best of his knowledge and belief such use has been exclusive.

ORLANDO M. BAKER.

Subscribed and sworn to before me, a notary public, this 5th day of May, 1906.

[I. e.]

CHAS. S. CLEAVES,

Notary Public.

No. 59,193.

TRADE-MARK.

REGISTERED JAN. 1, 1907.

G. & C. MERRIAM CO.

DICTIONARIES.

APPLICATION FILED MAY 17, 1906.

(Complainant's Exhibit,
Registered Trade-Mark No. 6)

WEBSTER'S
HIGH SCHOOL

Proprietor
G. & C. Merriam Co.
by Adair & Stephens
attys

UNITED STATES PATENT OFFICE.

G. & C. MERRIAM CO., OF SPRINGFIELD, MASSACHUSETTS.

TRADE-MARK FOR DICTIONARIES.

No. 59,193.

Statement and Declaration.

Registered Jan. 1, 1907.

Application filed May 17, 1906. Serial No. 19,817.

STATEMENT.

To all whom it may concern:

Be it known that G. & C. MERRIAM CO., a corporation duly organized under the laws of the State of Massachusetts, and having its principal place of business at 499 Main street, in the city of Springfield, State of Massachusetts, has adopted for its use the trade-mark shown in the accompanying drawing.

The trade-mark has been continuously used in the business of said corporation since 1892 and in the business of its predecessor since 1867.

The class of merchandise to which the trade-mark is appropriated is Class 68, Publications, and the particular description of

goods comprised in said class upon which said mark is used is dictionaries.

The trade-mark is usually displayed upon the goods by imprinting or impressing the same directly upon the books and upon the packages in which the books are wrapped.

[L. s.] G. & C. MERRIAM CO.,

By H. C. ROWLEY,

Treasurer.

Approved:

O. M. BAKER,

President.

Witnesses:

BERTON E. HALE,

ALBERT BOEDEKER.

DECLARATION.

State of Massachusetts, county of Hampden,
ss:

ORLANDO M. BAKER, being duly sworn, deposes and says that he is the president of the corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade-mark either in the identical form or in any such near resemblance thereto which might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several

States of the United States; that the description, drawing and facsimiles presented truly represent the mark sought to be registered, and that the mark has been in actual use as a trade-mark of the applicant, or its predecessors from whom it derived title, for ten years next preceding the passage of the act of February 20, 1905, and that to the best of his knowledge and belief such use has been exclusive.

ORLANDO M. BAKER.

Subscribed and sworn to before me, a notary public, this 5th day of May, 1906.

[L. s.]

CHAS. S. CLEAVES,

Notary Public.

TRADE-MARK.

No. 59,191.

REGISTERED JAN. 1, 1907.

G. & C. MERRIAM CO.

DICTIONARIES AND REFERENCE MANUALS.

APPLICATION FILED MAY 17, 1906.

(Complainant's Exhibit,
Registered Trade-Mark No. 7)

WEBSTER'S
CONDENSED

Proprietor

G. & C. Merriam Co.

by Hall & Abingdon 16 0192

UNITED STATES PATENT OFFICE.

G. & C. MERRIAM CO., OF SPRINGFIELD, MASSACHUSETTS.

TRADE-MARK FOR DICTIONARIES AND REFERENCE-MANUALS.

No. 59,191.

Statement and Declaration.

Registered Jan. 1, 1907.

Application filed May 17, 1906. Serial No. 19,615.

STATEMENT.

To all whom it may concern:

Be it known that G. & C. MERRIAM CO., a corporation duly organized under the laws of the State of Massachusetts, and having its principal place of business at No. 499 Main street, in the city of Springfield, State of Massachusetts, has adopted for its use the trade-mark shown in the accompanying drawing.

The trade-mark has been continuously used in the business of said corporation since 1892.

The class of merchandise to which the trade-mark is appropriated is Class 68, Publications, and the particular description of goods comprised in said class upon which

said mark is used is dictionaries and reference-manuals or combined dictionary and reference-manual.

The trade-mark is usually displayed upon the goods by imprinting or impressing the same directly upon the books and upon the packages in which the books are wrapped.

[L. s.] G. & C. MERRIAM CO.,
By H. C. ROWLEY,
Treasurer.

Approved: O. M. BAKER,
President.

Witnesses:
BERTON E. HALE,
RICHARD S. BETTES:

DECLARATION.

State of Massachusetts, county of Hampden, ss:

ORLANDO M. BAKER, being duly sworn, deposes and says that he is the president of the corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade-mark either in the identical form or in any such near resemblance thereto which might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States

of the United States; that the description, drawing and facsimiles truly represent the mark sought to be registered, and that the mark has been in actual use as a trade-mark of the applicant, or its predecessors, from whom it derived title, for ten years next preceding the passage of the act of February 20, 1905, and that to the best of his knowledge and belief such has been exclusive.

ORLANDO M. BAKER.

Subscribed and sworn to before me, a notary public, this 5th day of May, 1906.

[L. s.] CHAS. S. CLEAVES,
Notary Public.

TRADE-MARK.

No. 59,473.

REGISTERED JAN. 8, 1907.

G. & C. MERRIAM CO.
DICTIONARIES.

APPLICATION FILED MAY 11, 1906.

(Complainant's Exhibit,
Registered Trade-Mark No. 8)

WEBSTER'S
NATIONAL PICTORIAL

Proprietor
G. & C. Merriam Co.
by Hall & Heylman
attys

UNITED STATES PATENT OFFICE.

G. & C. MERRIAM CO., OF SPRINGFIELD, MASSACHUSETTS.

TRADE-MARK FOR DICTIONARIES.

No. 59,473.

Statement and Declaration.

Registered Jan. 8, 1907.

Application filed May 11, 1906. Serial No. 19,431.

STATEMENT.

To all whom it may concern:

Be it known that G. & C. MERRIAM CO., a corporation duly organized under the laws of the State of Massachusetts, and having its principal place of business at No. 499 Main street, in the city of Springfield, State of Massachusetts, has adopted for its use the trade-mark shown in the accompanying drawing.

The trade-mark has been continuously used in the business of said corporation since 1892 and in the business of its predecessor since 1867.

The class of merchandise to which the trade-mark is appropriated is Class 68, Publications, and the particular description of

goods comprised in said class upon which said mark is used is dictionaries.

The trade-mark is usually displayed upon the goods by imprinting or impressing the same directly upon the books and upon the packages in which the books are wrapped.

[L. s.] G. & C. MERRIAM CO.,
By H. C. ROWLEY,
Treasurer.

Approved: O. M. BAKER,
President.

Witnesses:
BERTON E. HALE,
ALBERT BOEDEKER.

DECLARATION.

State of Massachusetts, county of Hampden,
ss:

ORLANDO M. BAKER, being duly sworn, deposes and says that he is the president of the corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade-mark either in the identical form or in any such near resemblance thereto which might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States of the

United States; that the description, drawing and facsimiles presented truly represent the mark sought to be registered, and that the mark has been in actual use as a trade-mark of the applicant, or its predecessors from whom it derived title, for ten years next preceding the passage of the act of February 20, 1905, and that to the best of his knowledge and belief such use has been exclusive.

ORLANDO M. BAKER.

Subscribed and sworn to before me, a notary public, this 5th day of May, 1906.

[L. s.] CHAS. S. CLEAVES,
Notary Public.

No. 59,130.

TRADE-MARK.

REGISTERED JAN. 1, 1900.

G. & C. MERRIAM CO.

DICTIONARIES.

APPLICATION FILED MAR 11, 1900.

(Complainant's Exhibit,
Registered Trade-Mark No. 9)

WINTER'S
PRIMER

*Respectfully
G. & C. Merriam Co.
by Matt. D. [illegible]
[illegible]*

UNITED STATES PATENT OFFICE.

G. & C. MERRIAM CO., OF SPRINGFIELD, MASSACHUSETTS.

TRADE-MARK FOR DICTIONARIES.

No. 59,130.

Statement and Declaration.

Registered Jan. 1, 1907.

Application filed May 17, 1906. Serial No. 19,618.

STATEMENT.

To all whom it may concern:

Be it known that G. & C. MERRIAM Co., a corporation duly organized under the laws of the State of Massachusetts, and having its principal place of business at No. 499 Main street, in the city of Springfield, State of Massachusetts, has adopted for its use the trade-mark shown in the accompanying drawing.

The trade-mark has been continuously used in the business of said corporation since 1892 and in the business of its predecessor since 1867.

The class of merchandise to which the trade-mark is appropriated is Class 68, Publications, and the particular description of

goods comprised in said class upon which said mark is used is dictionaries.

The trade-mark is usually displayed upon the goods by imprinting or impressing the same directly upon the books and upon the packages in which the books are wrapped.

[L. s.]

G. & C. MERRIAM CO.,

By H. C. ROWLEY,

Treasurer.

Approved:

O. M. BAKER,

President.

Witnesses:

BERTON E. HALE,

ALBERT BOEDEKER.

DECLARATION.

State of Massachusetts, county of Hampden,
ss:

ORLANDO M. BAKER, being duly sworn, deposes and says that he is the president of the corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief has the right to use said trade-mark either in the identical form or in any such near resemblance thereto which might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States

of the United States; that the description, drawing and facsimiles truly represent the mark sought to be registered, and that the mark has been in actual use as a trade-mark of the applicant, or its predecessors from whom it derived title, for ten years next preceding the passage of the act of February 20, 1905, and that to the best of his knowledge and belief such use has been exclusive.

ORLANDO M. BAKER.

Subscribed and sworn to before me, a notary public, this 5th day of May, 1906.

[L. s.]

CHAS. S. CLEAVES,

Notary Public.

No. 59,187.

TRADE-MARK.

REGISTERED JAN. 1, 1907.

G. & C. MERRIAM CO.
DICTIONARIES AND REFERENCE MANUALS.
APPLICATION FILED MAY 11, 1906.

(Complainant's Exhibit,
Registered Trade-Mark No. 10)

WEBSTER'S
COUNTINGHOUSE
AND
FAMILY

Proprietor
G. & C. Merriam Co.
by Hall & Heylman
attys.

UNITED STATES PATENT OFFICE.

G. & C. MERRIAM CO., OF SPRINGFIELD, MASSACHUSETTS.

TRADE-MARK FOR DICTIONARIES AND REFERENCE-MANUALS.

No. 59,187.

Statement and Declaration.

Registered Jan. 1, 1906.

Application filed May 11, 1906. Serial No. 19,429.

STATEMENT.

To all whom it may concern:

Be it known that G. & C. MERRIAM CO., a corporation duly organized under the laws of the State of Massachusetts, and having its principal place of business at 499 Main street, in the city of Springfield, State of Massachusetts, has adopted for its use the trade-mark shown in the accompanying drawing.

The trade-mark has been continuously used in the business of said corporation since 1892 and in the business of its predecessor since 1867.

The class of merchandise to which the trade-mark is appropriated is Class 68, Publications, and the particular description of goods comprised in said class upon which

said mark is used is dictionaries and reference-manuals or combined dictionary and reference-manual.

The trade-mark is usually displayed upon the goods by imprinting or impressing the same directly upon the books and upon the packages in which the books are wrapped.

[L. s.] G. & C. MERRIAM CO.

By H. C. ROWLEY,
Treasurer.

Approved:

O. M. BAKER,
President.

Witnesses:

BERTON E. HALE,
ALBERT BOEDEKER.

DECLARATION.

State of Massachusetts, county of Hampden,
ss:

ORLANDO M. BAKER, being duly sworn, deposes and says that he is the president of the corporation, the applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation or association, to the best of his knowledge and belief, has the right to use said trade-mark either in the identical form or in any such near resemblance thereto which might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several

States of the United States; that the description, drawing and facsimiles presented truly represent the mark sought to be registered, and that the mark has been in actual use as a trade-mark of the applicant, or its predecessors from whom it derived title, for ten years next preceding the passage of the act of February 20, 1905, and that to the best of his knowledge and belief such use has been exclusive.

ORLANDO M. BAKER.

Subscribed and sworn to before me, a notary public, this 5th day of May, 1906.

[L. s.] CHAS. S. CLEAVES,
Notary Public.

"D."

Decree of Affirmance and Order for Mandate.

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court rooms, in the post-office building, in the City of New York, on the 28th day of June, one thousand nine hundred and thirteen.

Present: HON. E. HENRY LACOMBE, HON. HENRY G. WARD,
HON. WALTER C. NOYES, Circuit Judges.

G. & C. MERRIAM COMPANY,
Complainant-Appellant,

vs.

SYNDICATE PUBLISHING COMPANY,
Defendant-Appellee.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. G. W.

[ENDORSED:] United States District Court of Appeals, Second Circuit. Merriam Co. vs. Syndicate Pub. Co. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 2, 1913, William Parkin, Clerk.

[12695]

"C."

Final Decree.

At a Stated Term of the United States District Court for the Southern District of New York, held in the Court House, Borough of Manhattan, City of New York, on the 31st day of December, 1912.

Present—HON. LEARNED HAND, District Judge.

G. & C. MERRIAM COMPANY

VS.

SYNDICATE PUBLISHING COMPANY.

} E 8-162.

This cause came on to be further heard at a term of this Court, held in the Borough of Manhattan, on the 3rd day of December, 1912, and was argued by counsel, and thereupon, upon consideration thereof, it is

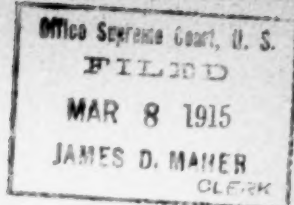
ORDERED, ADJUDGED AND DECREED, that the Bill of Complaint of the complainant herein be and the same is hereby dismissed upon the merits. And it is

FURTHER ORDERED, ADJUDGED AND DECREED that the complainant, G. & C. Merriam Company, do pay to defendant, Syndicate Publishing Company, the sum of
and

its costs as taxed by the Clerk of this Court, and that the defendant Syndicate Publishing Company, do have execution therefor.

LEARNED HAND,
D. J.

(Filed Jan. 6th, 1913.)



Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 217.

G. & C. MERRIAM COMPANY,
Complainant-Appellant,
vs.

THE SYNDICATE PUBLISHING COMPANY,
Defendant-Appellee.

**Brief in Support of Defendant-Appellee's Motion
to Dismiss the Appeal of Complainant-Appellant.**

HUGH A. BAYNE,
Counsel for Defendant-Appellee.

C. G. DUNGORTER, 73 to 76 Spring Street, New York.



SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914. No 217.

G. & C. MERRIAM COMPANY,
Complainant-Appellant,

VS.

SYNDICATE PUBLISHING COMPANY,
Defendant-Appellee.

**BRIEF IN SUPPORT OF DEFENDANT-AP-
PELLEE'S MOTION TO DISMISS PLAINT-
IFF-APPELLANT'S APPEAL.**

Appellant's bill of complaint (Motion Papers "A"), apart from the amendment hereinafter referred to, sets forth merely a cause of action for unfair competition in trade, the allegations being, in substance, that appellant's long use of the name "Webster's," in connection with the titles of its dictionaries, have given that name a secondary meaning, indicating dictionaries published by appellant, and that appellee's use of the name "Webster's" in the title of its dictionaries entitled "Webster's New Illustrated Dictionary," and "Webster's New Standard Dictionary" resulted in palming off appellee's dictionaries as and for dictionaries published by appellant.

No right to appeal to this Court exists, of course, from an adverse decision by the Circuit Court of Appeals upon the foregoing cause of action.

Later, however, by amendment (Motion Papers "B") appellant added allegations to its bill to the effect that the name "Webster's" was appellant's technical trade-mark for dictionaries, registered as such under the Federal Statutes of 1905 and 1881.

Eight of the ten registered marks referred to (Complainant's Exhibits, Registered Trade-Mark Nos. 3 to 10 both inclusive attached to "B" of the motion papers) were registered under the "ten year clause" of the Act of February 20, 1905, Sec. 5. The other two (*Id.*, Complainant's Exhibits, Registered Trade-Marks, Nos. 1 and 2) were registered under the Act of March 3, 1881.

No appeal lies to this Court from an adverse decision in a case arising under the foregoing Act of 1905.

Street & Smith vs. Atlas Manufacturing Company,
231 U. S., 348 (1913).

No charge is made that Appellee infringed any feature of the foregoing alleged trade-marks except the name "Webster's." Appellee's dictionary annexed to the bill, shows that there is no other feature of similarity.

This Court, therefore, has no jurisdiction to entertain this appeal unless the name "Webster's" was entitled to registration as a trade-mark under the Act of March 3, 1881.

In *Elgin National Watch Company vs. El. Watch Case Co.*, 179 U. S., 665, an analogous jurisdictional question was decided by this Court.

Leaving aside the question whether the Patent Office intended, by granting the two above registrations, under the Act of 1881, to recognize "Webster's" as a trade-mark except when used in conjunction with the designs, symbols, and collocations described in the registered drawings and declarations, it is obvious, I submit, on the face of appellant's bill and exhibits, that the name "Webster's" was not subject to appropriation as a trade mark, nor entitled to protection as such, under the Act of 1881.

The Act of 1881 did not purport to recognize as trade-marks names which, under the Common law, were not subject to exclusive appropriation. Not only are proper names, under the Common law, not subject to such exclusive appropriation, but the Act itself expressly forbade (Sec. 2) registration of the

x A picture of the cover, back and title page
hereof will be found at page 90 of Appellant's
brief on this appeal

name of the applicant; so that, *a fortiori*, the name of a stranger might not be exclusively appropriated by the applicant.

When it further appears, from the complaint itself, that the stranger whose name applicant claims as his trade-mark for dictionaries was the greatest lexicographer this or any English speaking country ever produced; that the Dictionary in words (*Webster's Dictionary*) has, by the acquisition of the copyright, long been in the public domain, free for anyone to publish and that it bears the name which identifies and describes it, it seems obvious that the allegations of applicant's amended bill to the effect that applicant is owner of the name "*Webster's*" as a trademark trade-mark even inserted solely to give color to a claim that this Court would have appellate jurisdiction. Applicant hoped, perhaps, to secure an opinion from this Court which might further the long continued, persistent but hitherto uniformly unsuccessful efforts to secure judicial recognition of its pretension to exclusive rights in the name "*Webster's*" as against competing Dictionary publications whose books are based on the work of that famous lexicographer.

The list of its numerous failures to secure that recognition is a long one.

Merion vs. Bellows, 65 Fed. Cl., 600 was the last one.

In that case Justice *Wright* characterized the Merion Co.'s pretension to exclusive rights in the name "*Webster's*" as "all nonsense" (p. 675). This Court quoted the language in the *Niger* case (210 U. S., at page 140).

To the same effect are:

Merion vs. Francis & Channing Company, 67 Fed. Cl., 601;

Merion vs. Town Savings Co., 66 Fed. Cl., 566;

Merion vs. Stevens, 100 Fed. Cl., 677;

Cyprus vs. Merion, 125 Fed. Cl., 600; 103 Fed. Cl., 600; 271 Fed. Cl., 107; 100 Fed. Cl., 607;

Merion vs. Southfield, 100 Fed. Cl., 607; 100 Fed. Cl., 608.

In the *Ogilvie* cases (*supra*) Ogilvie, complaining that appellant interfered with his Webster's dictionary business, by claiming exclusive rights in the name "Webster's," brought suit against appellant, and succeeded in obtaining a perpetual injunction restraining it from

"in any manner claiming that it, the defendant, or any other person, firm or corporation claiming under or through it, has exclusive right to the use of the name 'Webster's' in the title of dictionaries" (190 Fed. R., at p. 931).

It is obvious, therefore, that appellant's claim that appellee's use of the name "Webster's" in the title of its dictionaries infringes appellant's rights presents no question involving a trade-mark entitled to registration under the Act of March 3, 1881, but only questions of secondary meaning rights, or of unfair competition, as to which this Court has no appellate jurisdiction by appeal.

Conscious that appellant's right of appeal to this court was, at best, doubtful, appellant, after perfecting the appeal, petitioned this court to take jurisdiction of this case by writ of *certiorari*. That petition was denied.

Appellant's appeal should be dismissed for lack of jurisdiction.

Respectfully submitted,

HUGH A. BAYNE,
Of Counsel for Appellee.

Supreme Court of the United States,

OCTOBER TERM, 1914.

G. & C. MERRIAM COMPANY,
Complainant-Appellant,

VS.

SYNDICATE PUBLISHING COMPANY,
Defendant-Appellee.

No. 217.

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL FOR WANT OF JURISDIC- TION.

I.

THIS APPEAL LIES AS A MATTER OF RIGHT; THIS COURT HAS JURISDICTION; AND THE WHOLE CASE IS OPEN TO REVIEW.

A single cause of action is alleged in the bill of complaint, as amended. The act complained of is the sale by defendant of a British dictionary, known by the name of "British Empire Dictionary," under the false and misleading name, stamp or brand of "Webster's" dictionary, it being neither a copy of, nor in any way related to, or connected with, any edition of "Webster's" dictionary. This act is charged to be a violation of complainant's rights as the long established proprietor of the well known "Webster's" dictionaries in that (a) it constitutes unfair or fraudulent competition, and (b) it infringes certain specific trade-marks registered under the United States Trade-Mark Acts

of March 3, 1881, and also certain other trade-marks registered under the Act of February 20, 1905.

Jurisdiction of the Circuit Court was not rested entirely upon the ground of diversity of citizenship, although that fact exists and is duly alleged (Motion Papers, p. 7). The jurisdiction was also expressly rested upon a claim of a right, privilege or immunity under the Federal Trade-Mark Acts of 1881 and 1905. Accordingly, this case is not one in which the decision of the Circuit Court of Appeals is made final by Judicial Code, Section 128, and, therefore, by the express provisions of Judicial Code, Section 241, this appeal lies as a matter of right unless limited by some provision in the Trade-Mark Acts. The Act of 1905 does contain provisions making the decision of the Circuit Court of Appeals final in cases arising under *that* Act, and if the only question of federal right involved in this case arose under the Act of 1905 this appeal would not lie (*Street & Smith v. Atlas Mfg. Co.*, 231 U. S. 348).

But this case does not arise solely or mainly under the Act of 1905. The bill alleges and claims rights under the Act of 1881, under which complainant's basic and broadest trade-marks are registered (See trade-marks Nos. 1 and 2, Motion Papers, pp. 53 *et seq.*). Accordingly an appeal does lie herein as a matter of right, for, as this court said in the *Street & Smith* case, *supra*:

"Of course, that case and this are not to be confused with others arising under earlier trade-mark laws not containing any provisions respecting appellate jurisdiction such as are embodied in the act of 1905."

This court has repeatedly held that where one ground for invoking the jurisdiction of the federal circuit court is the registration of a trade-mark under the

Act of 1881, this court has jurisdiction of an appeal, which lies as a matter of right (*Baglin v. Cusenier Co.*, 221 U. S. 580; *Jacobs v. Beecham*, 221 U. S. 263; *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U. S. 446; *Warner v. Searle & H. Co.*, 191 U. S. 195).

The decisions of this court last above cited also establish the proposition that where there is general federal jurisdiction of the whole case because of diverse citizenship, and also a federal question arising under the trade-mark laws giving a right of appeal to this court, the whole case comes up for review, and this court has, and will exercise, jurisdiction to determine the question of unfair competition, and all other questions arising upon the record, regardless of its determination of the questions of validity and infringement of trade-mark (*Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U. S. 446, and cases last above cited). The principle is the same as in cases of direct appeals where a constitutional question is involved. In such cases this court has jurisdiction to determine every question arising upon the record,—non-federal as well as federal questions, and is not limited to a determination of the constitutional question (*Boise Artesian Hot & Cold Water Co. v. Boise City*, 230 U. S. 84; *Chappel v. United States*, 160 U. S. 499). The general rule is that if the cause of action is based upon a federal statute, an appeal lies to this court from the decree of the Circuit Court of Appeals (*Chicago Junction R. Co. v. King*, 222 U. S. 222). Here the cause of action is based upon the Federal Trade-Mark Act of 1881, which expressly provides (§ 7):

“Courts of the United States shall have original and appellate jurisdiction in such cases without regard to the amount in controversy.”

The fact that the same acts which violate appellant's rights under the Act of 1881 also violate rights claimed under the Act of 1905, and the common law against fraudulent competition, does not deprive this court of jurisdiction. The required jurisdictional amount is in controversy and is duly alleged (Motion Papers, p. 45).

The fact that infringement of registered trademarks was added to the bill by amendment does not make the decision of the Circuit Court of Appeals final (*Vicksburg v. Henson*, 231 U. S., 259). Such amendment was filed before defendant had answered the original bill, and within the time within which complainant was entitled to amend as of right.

II.

THE FALLACY IN APPELLEE'S ARGUMENT.

The fallacy in appellee's argument in support of its motion to dismiss consists, first, in overlooking the fact that diverse citizenship exists in this case, thus giving general federal jurisdiction of the whole case, including both federal and non-federal questions. The *Elgin National Watch Co.* case (179 U. S. 665), relied on by appellee, was expressly distinguished upon this ground in *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U. S. 446. The case at bar presents the precise situation dealt with in the *Standard Paint Co.* case, *supra*. There being general federal jurisdiction of the whole case because of diverse citizenship, and the decision of the Circuit Court of Appeals not being made final, because the jurisdiction of the Circuit Court was not based entirely upon such diverse citizenship, and there being no pro-

vision in the Trade-Mark Act of 1881 making the decision of the Circuit Court of Appeals final in cases arising under that act, this court has jurisdiction of this appeal, and the motion to dismiss should be denied.

A second fallacy in appellee's argument is the attempted division of a single cause of action into three separate causes of action, and the assertion that as to two of such causes of action, viz., unfair competition, and infringement of trade-marks registered under the Act of 1905, no appeal lies to this Court, and that as to the alleged third cause of action, viz., infringement of trade-marks registered under the Act of 1881, the trade-marks are invalid, and not infringed. It is not permissible to split a single cause of action in this manner. Moreover, the questions as to the validity and infringement of the trade-marks registered under the Act of 1881 are questions on the merits, and are not open upon a motion to dismiss for want of jurisdiction. They are questions to be determined at the hearing of the appeal on the merits. They are fully argued in appellant's brief, already served and filed, and appellant claims the right to be heard thereon.

To prevent misapprehension, it is proper to state here that every one of the prior "Webster's Dictionary" cases cited in appellee's brief on this motion (p. 3) resulted in a decision in favor of this appellant. Appellee's statement of their result is inaccurate and unfair. But this goes to the merits. These cases are all discussed in appellant's brief on this appeal already filed. Precisely similar trade-marks were held valid and infringed in the "*Singer Sewing Machine*" case (163 U. S. 169), and the "*Beecham's Pills*" case (221 U. S. 263).

III.

SOME EQUITABLE CONSIDERATIONS.

This appeal was perfected in the summer of 1913, and appeared on the calendar of this court for the October Term, 1913. The case of *Street & Smith v. Atlas Mfg. Co.*, 231 U. S. 348, had not then been decided. Out of abundant caution, appellant also petitioned this court for a writ of *certiorari*. Appellee opposed said petition upon the ground that such writ was unnecessary, because the case was already here on appeal. The writ of *certiorari* was accordingly denied. It would be unjust, at this late day, to dismiss the appeal, unless a total want of jurisdiction is clearly apparent, and if necessary, the court should even now grant a writ of *certiorari*. Appellant has been put to large expense in printing the record, and in preparing and printing its brief on the appeal. The case is now on the eve of being reached for argument on the merits. A motion to dismiss at this late day should not be received with favor.

The motion to dismiss for want of jurisdiction should be denied, or at least reserved until the argument on the merits.

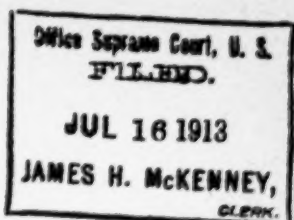
Respectfully submitted,

WILLIAM B. HALE,

Counsel for Appellant.

NEW YORK, March 15, 1915.

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No. ~~611~~



IN THE
Supreme Court of the United States,
OCTOBER TERM, A. D. 1913.

G. & C. MERRIAM COMPANY,

Petitioner.

v.s.

SYNDICATE PUBLISHING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

WILLIAM B. HALE,

Counsel for Petitioner.

IN THE
Supreme Court of the United States,
OCTOBER TERM, A. D. 1913.

G. & C. MERRIAM COMPANY,
Petitioner,

VS.

THE SYNDICATE PUBLISHING
COMPANY,
Respondent.

**Petition for Writ
of Certiorari.**

TO THE HONORABLE, THE CHIEF JUSTICE AND THE
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

Your petitioner, G. & C. Merriam Company,
a corporation, of Springfield, Massachusetts,
respectfully shows:

The object of this suit is to protect the well
known Webster's Dictionary from unfair and
fraudulent competition whereby the public is de-
ceived and the petitioner damaged. The precise
question presented is whether or not the expira-
tion of copyright upon an early obsolete edition
of Webster's Dictionary justifies respondent in
obtaining the plates of a book called the Crown
Dictionary, which is a mere American reprint of
a British book called the British Empire Diction-
ary, and in printing therefrom a book re-entitled
Webster's New Standard Dictionary, the only
new thing about it being the title. No infringe-
ment of petitioner's copyrights is charged, and no
protection to literary property as such is sought.
The text of respondent's book does not infringe
the text of petitioner's books. It is a wholly dif-
ferent composition. It is merely the title that in-
fringes. The bill seeks an injunction against un-
fair competition whereby respondent is trespass-

ing upon the good will and reputation of petitioner's current Webster's dictionaries and in deceiving the public into purchasing respondent's British dictionary under the belief that it is one of the current Webster dictionaries, which enjoy an established authority and reputation, and for which there is a steady call in the market, created by petitioner's labor, skill and expenditures. The principal facts are as follows:

Petitioner is the publisher and proprietor of the well known reference work known as Webster's Dictionary, which, with the equally well known Standard, Century and Worcester's dictionaries, is one of the universally recognized and accepted dictionary authorities of this country. The now current Webster dictionaries of petitioner are the last regular successive editions and revisions of a series of Webster dictionaries originally prepared and owned by Noah Webster, and upon his death in the year 1843, transferred and assigned by his estate to petitioner's predecessor, the firm of G. & C. Merriam, of which petitioner is the corporate successor. Continuously since that time, for a period of almost seventy years, petitioner and its predecessors have carried on the business of revising and publishing this series of dictionaries.

Beginning in the year 1847, and continuing down to the present date, the Merriams have compiled, published, copyrighted and owned a long line of Webster dictionaries, both abridged and unabridged. Each successive book in this series was based upon and was a revision and an enlargement or abridgment of the preceding editions. As the older editions became obsolete, they were withdrawn from sale and the later editions took their names and place in the market. The full list of petitioner's said publis-

tions are the dictionaries now being sold by petitioner, and these are the books now known to and called for by the public by the short name of Webster's Dictionary.

Since the death of Noah Webster in 1843, the Merriams have four times revised and enlarged Webster's Unabridged Dictionary, by adding thousands of new words which have come into use, and by revising and enlarging the definitions of old words as modified by modern usage. These were the editions of 1847, 1864, 1890 and 1909. After each revision new abridgments were made to supply the demand for small authoritative dictionaries, which took the place of the old, and kept said small dictionaries in conformity with the latest unabridged edition. This work of revision and enlargement was done by men of the highest scholarship, among whom may be mentioned, Noah Porter, President of Yale; Daniel C. Gilman, President of Johns Hopkins; Arthur T. Hadley, President of Yale; Dr. W. T. Harris, United States Commissioner of Education; Professor William D. Whitney; Professors Edward S. Sheldon, George L. Kittridge, and Leo Wiener, of Harvard. Through these men and their co-workers the Merriams have built up Webster's Dictionary from a vocabulary of 70,000 words, compiled and defined by Noah Webster, to a work of 400,000 words and phrases, compiled and defined in the latest edition—Webster's New International Dictionary of 1909. This literary labor alone has cost the Merriams the sum of \$1,100,000 since the 1847 edition was superseded, and as a result of it, the Webster dictionaries of petitioner have become a standard authority of the English language in every

civilized country of the globe. More than 12,000,000 copies of petitioner's Webster dictionaries have been sold under that name since 1864, and for many years these dictionaries have been the officially adopted standard authority in the schools of this country. This school adoption and use has been practically universal, covering every section of the country. The various Courts of the country have for many years used petitioner's dictionaries as a standard authority, citing them as Webster's Dictionary or simply as Webster, which has always indicated a dictionary of petitioner's series. In advertising its Webster dictionaries, the Merriams have spent more than \$1,900,000, and have issued more than 86,000,000 circulars, in addition to continuous newspaper and magazine advertising, and for many consecutive years petitioner has spent in excess of \$50,000 annually for advertising its dictionaries. In this manner the name and reputation of Webster's Dictionary has been built up by petitioner and its predecessors through more than sixty years of effort and at a cost of over \$3,000,000.

The public reputation for accurate and authoritative contents is attached to the now current copyrighted dictionaries of petitioner. These alone are known as Webster's Dictionary to the present generation of average buyers and users of dictionaries. The earlier books in this series have become long since obsolete, and have been for many years superseded in the public mind and use by later and revised editions published and copyrighted by petitioner. In short, a purchaser now asking for a Webster's Dictionary desires and expects to receive one of the present standard dictionaries of established reputation which, with-

out controversy, are the dictionaries now being issued by petitioner.

In both a primary and a secondary sense the name Webster's Dictionary now indicates to the public the petitioner's dictionaries. All of petitioner's current books are now, and for a long time have been, published and copyrighted under the name or title of Webster's Dictionary, some additional descriptive word, like Unabridged, International, Condensed, Academic, High School, etc., being usually added to indicate the particular variety or size. They are all known as Webster's Dictionary and are universally called for by that name. The primary meaning of the term Webster's Dictionary, therefore, is the current dictionary of established reputation under that name, a book title being the generic description of the particular book bearing that title. The secondary meaning of the term Webster's Dictionary is that any book bearing that name comes from the same source, belongs to the same series, and has the same quality, authority and reputation as the previous well known Webster dictionaries. This case is unique among unfair competition cases, in that respondent's use of the term is false in both its primary and secondary senses. Petitioner's right to relief depends not alone upon proof that a descriptive term has acquired a secondary meaning and come to indicate petitioner's goods, but is supported also by the fact that even the present primary descriptive meaning of such term indicates the dictionaries of petitioner.

In 1911, the respondent, The Syndicate Publishing Company, published a dictionary entitled, "Webster's New Standard Dictionary", a copy of which is filed herewith marked, "Petitioner's

Exhibit, Respondent's Dictionary". This dictionary was admittedly printed from the plates of an older dictionary entitled "The Crown Dictionary", which last named dictionary was a mere reprint of a still older British dictionary, published in England, and entitled, "The British Empire Dictionary". Copies of said Crown Dictionary and said British Empire Dictionary are filed herewith as exhibits. As will appear from inspection of said dictionary exhibits, respondent simply changed the name from British Empire and Crown to Webster's, omitted the author's name and copyright notices, and substituted in lieu thereof the name of Noah Webster and a new copyright notice, and then issued the book as a new Webster Dictionary, without anything whatever to distinguish the same from the Webster dictionaries of petitioner, or to warn the purchasing public that it was not one of the series of established Webster dictionaries of which they had previously known, and which enjoyed an established reputation for excellence. Respondent then widely advertised and sold this British Empire or Crown Dictionary as a genuine Webster's Dictionary, and as Webster's New Standard Dictionary.

Thereupon, in November, 1911, petitioner filed its bill of complaint in the Circuit Court of the United States for the Southern District of New York, setting forth the facts hereinbefore stated, but amplified and in greater detail, and praying for an injunction restraining the respondent, The Syndicate Publishing Company, from using as the name or title of its said British Empire or Crown Dictionary the words, "Webster's Dictionary", or for such other relief as might be equitable,

upon the ground that such use of the name Webster's Dictionary as the substituted title of respondent's Crown or British Empire Dictionary was fraudulent and deceptive and had deceived many persons into buying respondent's dictionary as and for the dictionary of petitioner, and therefore constituted unfair competition.

Respondent appeared and filed an answer (1) denying that the name "Webster" had acquired a secondary meaning in connection with dictionaries, or that it indicated the dictionaries of petitioner; (2) asserting that the expiration of the copyright upon the early editions of Webster's Dictionary had rendered the name Webster wholly *publici juris*, and authorized its use as the title of any dictionary containing any part of the literary contents of the dictionaries of which Noah Webster was the author or proprietor; and (3) asserting that defendant's dictionary was "based" upon the 1847 edition of Webster's Unabridged Dictionary and was, therefore, entitled to be called Webster's Dictionary, without any explanatory statement affirmatively distinguishing it from petitioner's long established Webster dictionaries.

At final hearing the Court found and declared that the actual basis of respondent's book was the British Empire Dictionary. It further found that this British Empire Dictionary was in turn based upon another British Dictionary called the "Imperial Dictionary," which had been compiled by John Ogilvie about the year 1852, and that this dictionary of Ogilvie had been based in turn upon the Webster's Unabridged Dictionary of 1847. The Court held that this sort of literary descent authorized respondent, in the year 1911, to

rechristen its book and adopt the name Webster's Dictionary, although for half a century it and the sources from which it was derived had borne a different name and had a different and distinctive identity. The Court assumed for the purpose of the decision, though without making any finding thereon, that the name Webster had acquired a secondary meaning and become identified with petitioner's books. Thereupon the court dismissed the bill upon the merits with costs, thus affording petitioner no relief whatsoever. Upon appeal the Circuit Court of Appeals for the Second Circuit on, to wit, the 2nd day of July, 1913, affirmed the decree of the District Court upon the opinion below.

A certified transcript of the record is filed herewith as an exhibit, from which the foregoing facts will more fully and at large appear.

By this decision the Court below has adjudged that the expiration of copyright upon the early obsolete editions of the Webster series authorizes any one to publish substantially different and variant dictionaries under the title of Webster's Dictionary in competition with the current dictionaries of the established Webster series, already copyrighted and known by that name. Specifically it was held that respondent was authorized to import an old English dictionary entitled, "British Empire Dictionary" and dropping that name, to reprint and sell it under the title of Webster's Dictionary in competition with the wholly different and established Webster dictionaries of petitioner, well known in the market by that name.

Petitioner prays a review of this decision by *certiorari* upon the grounds that it is erroneous

and in direct conflict with the decision of the Circuit Court of Appeals for the First Circuit in the case of *Merriam v. Ogilvie*, 159 Fed. 638; 170 Fed. 167, and of the Sixth Circuit in *Merriam v. Salfield*, 198 Fed. 369, both of which cases were substantially similar to the case at bar, and in both of which petitioner's prior rights in the name Webster as applied to dictionaries was adjudicated and protected. The decision below is also indirect and irreconcilable conflict with controlling decisions of this Court, particularly in the cases of *Singer v. June Mfg. Co.*, 163 U. S. 169, and *Jacobs v. Beecham*, 221 U. S. 263. It is also inconsistent with a long line of authorities both in this country and in England, which are referred to in petitioner's accompanying brief. Respondent should have been enjoined from using the name "Webster's Dictionary" as the title of its book, or, at the very least, required to accompany that title with a plain statement unmistakably distinguishing its dictionary from those of petitioners.

The question involved in this suit is also involved in other like suits which petitioner now has pending in various Circuits, and some of which are, by stipulation, awaiting the final determination of this as a test suit.

It is of the utmost importance that one correct and uniform rule as to the effect of the expiration of copyright upon early editions of reference books be authoritatively established. If the decision below be permitted to stand, there will be a flood of disconnected and variant dictionaries of all sorts published under the denomination of Webster's Dictionary. Confusion, contradiction and the ultimate destruction of the literary reputation and authority of the present long estab-

lished Webster's Dictionary will inevitably and speedily result. The question is of general importance because it applies equally to all copyrighted works, particularly dictionaries, encyclopedias and other reference works, which go through many editions. It has also arisen in regard to the use of the name of patented articles after the patent has expired.

The rule upon this subject contended for by petitioner is as follows:

1. When the copyright expires upon any book entitled Webster's Dictionary, any one may publish a substantial reprint of the expired book under that title, because it is truthfully descriptive, but appropriate precaution must be taken to prevent confusion of editions and of publishers. This is the doctrine of the *Singer* case (163 Fed. 169) and of all the prior *Webster Dictionary* cases. (198 Fed. 369; 159 Fed. 638; 170 Fed. 167; 136 Fed. 477; 49 Fed. 944; 47 Fed. 411; 43 Fed. 450.)

2. Substantially new and different dictionaries, and *a fortiori* a distinct British dictionary of different name, may not be given the title Webster's Dictionary, because that name is not truthfully descriptive of such a book and necessarily confuses it with the current established book of that name. There is no honest need to use petitioner's established trade-name as the name of such a new and different book. It should be given a distinctive name of its own, though of course a truthful descriptive statement of any use actually made of the expired book in compiling the new book may be plainly printed upon the title page or elsewhere.

3. As respondent's dictionary is admittedly a substantial reprint of a British dictionary, and not even a substantial copy of any previous genuine Webster's dictionary, either expired or unexpired, respondent should have been enjoined from selling it under the title of Webster's Dictionary, because that is a false description of the identity of the book, and inevitably confuses it with petitioner's well known current Webster dictionaries. If it be true that respondent's book is based upon Webster's Dictionary of 1847, as alleged in the answer, a descriptive statement of that fact may properly be used in connection with respondent's book, but that fact does not justify respondent in using the words Webster's Dictionary as the principal title and market name of its book.

These rules are well supported by reason and authority, as appears from petitioner's accompanying brief. They deprive no member of the public of any right or advantage to which he is honestly entitled. They give the public the full benefit and unrestricted use of the literary property which has fallen into the public domain by reason of the expiration of copyright. They prevent deception of purchasers, and at the same time protect the proprietor in the good will and reputation of its current copyrighted dictionaries.

WHEREFORE your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain therein to be designated, a full and complete transcript of the record and all proceedings of said Court in

the said case therein entitled, *G. & C. Merriam Company, appellant, v. Syndicate Publishing Company, appellee*, No. 210, October Term, 1912, to the end that said case may be reviewed and determined by this Court as provided by law, and said decision and decree of the United States Circuit Court of Appeals for the Second Circuit may be reversed, and that a decree may be directed enjoining the respondent from using the name Webster, or Webster's Dictionary, as the whole or a part of the name or title of its said dictionary, or for such other and different relief as may be deemed just, and thus your petitioner will ever pray.

Dated, September 10th, 1913.

WILLIAM B. HALE,
Counsel for Petitioner.

UNITED STATES OF AMERICA, }
State of Massachusetts, } ss.:
County of Hampden, }

O. M. BAKER being duly sworn, deposes and says, that he is the president of G. & C. Merriam Company, the petitioner above named; that he is familiar with the facts and matters set forth in the said petition, and that the allegations of said petition are true as he verily believes.

O. M. BAKER

Subscribed and sworn to before me this 10th day of }
September, 1913. }

Charles S. Cleaver

Notary Public.

(Seal)

I hereby certify that I have examined the foregoing petition and that in my opinion the said petition is well founded in point of law and that the same is not interposed for delay, and that the case is one in which the prayer of the petitioner should be granted.

Dated, September 10th, 1913.

WILLIAM B. HALE,
Counsel for Petitioner.

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No. ~~644~~

Office Supreme Court, U. S.
FILED.

SEP 22 1913

JAMES H. MCKENNEY

IN THE
Supreme Court of the United States,
OCTOBER TERM, A. D. 1913.

G. & C. MERRIAM COMPANY,

Petitioner,

vs.

SYNDICATE PUBLISHING COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI.

WILLIAM B. HALE,

Counsel for Petitioner,

40 Wall Street,

New York City.

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IN THE
Supreme Court of the United States,
OCTOBER TERM, A. D. 1913.

G. & C. MERRIAM COMPANY,
Petitioner,

VS.

SYNDICATE PUBLISHING COM-
PANY,
Respondent.

**BRIEF IN SUPPORT OF PETITION FOR
CERTIORARI.**

I.

IMPORTANCE OF CASE TO THE LITIGANTS, THE
TRADE AND THE PUBLIC.

The facts set out in the accompanying petition were abundantly established by the proofs, and were either found or assumed by the court below as the basis of its decision. The controlling question presented here is purely one of law. Obviously this case is of vital importance to the petitioner in that its entire business is inseparably and completely based upon, and identified by, the word "Webster". All its dictionaries are known as Webster's dictionaries and have been known, bought and sold, and become a standard authority of great reputation only under the name of "Web-

ster". Petitioner is not claiming any monopoly after expiration of copyright. It seeks merely protection for its current copyrighted Webster dictionaries of established reputation against unfair and fraudulent competition. Petitioner acquiesces in the prior rulings of the courts allowing other publishers to utilize the title "Webster's Dictionary" whenever the literary contents of the book is a reproduction, or a reprint, of a genuine Webster Dictionary upon which the copyright has expired,—that is, whenever the use of that title is a truthful use. It merely claims that in such a case the name must be accompanied by some proper announcement indicating the new origin of the book, and distinguishing such reproduction of an obsolete edition from the current modern editions to which that name has been transferred and applied by the public. But that is not this case. The decision dismissing the bill permits respondent to apply the name "Webster's Dictionary" to a book which never before bore that name, and which is radically different from the books of that name upon which the copyright has expired, and also radically different from the books known by that name to the present generation upon which the copyright has not expired. If the word "Webster" is now declared to be a word *in gross* which may be bestowed as a name upon any dictionary containing any literary matter whatsoever, and published by any person, widespread deception of the public will result, and petitioner will be deprived, after consistent, logical and profound work of the most eminent scholars for over half a century upon the Webster series, of the deserved reward of its labors. Against the assaults of books with new liter-

ary and mechanical origin, and with new or different literary contents, the reputation of the Webster dictionaries is doomed, and its complete destruction is inevitable. For example, in the present case, the respondent has imported the British Empire Dictionary, and dropping that name, now offers it to the public as Webster's New Standard Dictionary. In a case now pending in the Sixth Circuit, brought by petitioner against one Saalfeld, the defendant imported another British dictionary called Chambers' Twentieth Century Dictionary, and dropping that name, offers it to the public of this country as a Webster's Dictionary. In three suits now pending in the Seventh Circuit brought by petitioner against W. B. Conkey, Charles C. Thompson Co. and M. A. Donohue & Co., respectively, the defendants have each imported an English book entitled Blackie's Shilling Dictionary and are now offering to the public a photographic reprint of it as Webster's Dictionary. The decision below encourages the continuation and repetition of such frauds. A tremendous amount of litigation is pending, which it is important to petitioner and other litigants that it be determined as expeditiously and inexpensively as possible. A decision of the ultimate tribunal establishing once and for all the exact rights of petitioner and the public in the word "Webster" as applied to dictionaries, will practically terminate all this pending litigation, and will render further litigation unnecessary.

Again the book trade is interested both as a concrete proposition in reference to the word "Webster", and as a general proposition in reference to titles of books upon which the copyright

has expired, in the determination of the rule to be hereafter applied to new editions, and in the final settlement of the question as to whether the name of a book can be, after expiration of copyright, used competitively upon any book by anybody under any and all circumstances, or whether the use of the name must not be limited to a truthful use upon reproductions or reprints of the original book, and whether or not even such use, truthful in only one sense, must not be accompanied by affirmative precautions so as to make it truthful in every sense. The principle involved is equally applicable to cases involving expired patents. The final determination of the question whether the expiration of a patent justifies rival manufacturers in applying the name of the patented article to other articles not made in accordance with the expired patent, is also of vast importance to manufacturers throughout the country, and has actually arisen.

The Webster dictionaries are works of national importance, of universal adoption and use in the public and private schools of the country, and every American who is interested in the growth and development of the English language, and its consistent and logical advance, and every educator in the country, is directly concerned in keeping the Webster dictionaries intact as a series and in not permitting miscellaneous works, having no literary or commercial connection with the established Webster series, to be designated by a name which falsely represents them in the public mind as belonging to that series and coming from the same source, whereas they will emanate from any and every source.

A sound public policy should encourage the

producers of standard reference works, such as the Webster Dictionary of petitioner, to improve and develop them, and keep them abreast with the times, by securing to them the just rewards of the good will established by their enterprise and scholarship. There will be no incentive to produce revised and improved works if the good will acquired by merit may be appropriated by the first unscrupulous publisher who sees a profit in it.

All of these questions are of such importance, both public and private, as to justify a review and final determination by this Court.

II.

SUMMARY OF ESTABLISHED RULES APPLICABLE TO CASE AT BAR.

The defense herein asserts, and the dismissal of the bill herein sanctions, an unrestricted and unconditional right to use the words, "Webster's Dictionary," because petitioner has no *exclusive* right to the use of those words. Petitioner rejoins that an exclusive proprietary right is unnecessary to relief against a fraudulent manner of using even common terms like the adjectives of the language. It is fully admitted that the title of a book is not a technical trade-mark for that book, because essentially descriptive of it; and it is fully admitted that the expiration of the copyright upon a book authorizes any one to reprint that book and use its familiar title upon such reprint. Petitioner has and claims no exclusive right in the name Webster's Dictionary as against those who use it

truthfully and honestly. But against a dishonest, untrue, and deceptive mode of using that name, petitioner is entitled to complain by reason of its long prior appropriation and user thereof, and the application of it by the public to petitioner's current dictionaries.

The whole law of unfair competition is based upon the principle of business morality that one person will not be permitted to pass off his goods as those of another who has succeeded in establishing a reputation for the quality of his goods. The reason for the rule is that the reputation and good-will which a particular proprietor succeeds in establishing for his own goods and methods of dealing are his property,¹ and are entitled to protection as any other property.² The means by which one man's goods are passed off as those of another are wholly immaterial, because it is unlawful to produce that result by any means.³ "Unfair competition does not necessarily involve the violation of any exclusive right to the use of a word, mark, or symbol. It may arise from the

¹Coxe, *J.*, said in *Clark Thread Co. v. Armitage*, 67 Fed. 896, 900: "The demand is for the complainant's thread, and, though other thread is used to a limited extent, it is not too much to say that in certain localities the market belongs to the complainant. I has taken capital, industry and years of arduous endeavor to produce this result. If the complainant had not dealt honestly with the public it would not be in this position today. Its success is due to the fact that for a generation it has furnished an article in which the people had faith. This good will is the complainant's inheritance and its property. It is as much a part of its assets as its mill or its counting house. No one has a right to destroy it except by fair and honest competition. No other manufacturer has a right to take away the complainant's customers by inducing them to believe that they are purchasing the complainant's goods."

²*Reddaway v. Banham*, [1896] App. Cas. 199.

³"Equity does not concern itself as to what the means, how, or with what intent they are used, if the result is fraud, and, if the public are induced thereby to purchase the goods of one under the belief that they are those of another, such means will be enjoined." *Bates Mfg. Co. v. Bates Numbering Machine Co.*, 172 Fed. 892, 895.

use of words, etc., which everybody may use. The question is whether what is done in a special case tends to pass off the goods of one for those of another, or tends to deprive such other of his rights."¹

The exclusiveness or non-exclusiveness of a complainant's right in a trade name used by another as the instrument of harm merely affects the form of the relief which will be granted. If the right be exclusive, as in the case of technical trade-marks, an absolute unqualified injunction will be granted and use in any form will be enjoined. If the right be not exclusive, as in the case of generic, geographical, or personal names, the injunction will merely regulate the defendant's manner of using the trade-name so as to prevent deception. The court will then prohibit any untrue, unnecessary, or inappropriate manner of use which unduly injures the complainant, and will require the defendant to adopt reasonable precautions to prevent confusion and consequent damage, but will leave him at liberty to use the word in any manner which is honest and fair and not calculated to deceive the public. These rules are well established and have been often applied.

Thus, although no one can acquire an exclusive right in a geographical name, such a name may acquire a trade significance, termed "a secondary meaning", which will be protected by injunction against any misleading manner of use by a rival trader. *French Republic v. Saratoga Vichy Springs Co.*, 191 U. S. 427, ("Vichy"); *Elgin Watch Co.*

¹*Bates Mfg. Co. v. Bates Numbering Machine Co.*, 172 Fed. 892, 895. See also *American Tobacco Co. v. Polacsek*, 170 Fed. 117, 121.

v. *Illinois Watch Co.*, 179 U. S. 665 ("Elgin Watches"); *Shaver v. Heller*, (C. C. A.) 108 Fed. 821, 832, ("American Ball Blue"); *Pillsbury Washburn Flour Mills Co. v. Eagle*, (C. C. A.) 86 Fed. 608, ("Minneapolis Flour"); *Wotherspoon v. Currie*, L. R. 5, H. L. 508, ("Glenfield Starch").

The same rule applies to the use of personal names. No one has an exclusive right to the use of his own name against as another person of the same name. But the right to use one's own name is not superior to the obligation of using it honestly, and so as not unduly to injure another, and injunctions are, therefore, often granted regulating a man's use of his own name, and prohibiting its use in such a manner as to confuse his goods with those of another in the public mind. *Herring-Hall-Marvin Safe Co. v. Hall's Safe Co.*, 208 U. S. 554, ("Hall's Safes"); "*Baker Chocolate cases*", 87 Fed. 209, (C. C. A.) 130 Fed. 514; *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. 357 ("Bissell Plows"); *Rowley v. J. F. Rowley Co.* (C. C. A.) 161 Fed. 94 ("Rowley Legs"); *Reed Cushion Shoe Co. v. Frew*, (C. C. A.) 162 Fed. 887, ("Reed Cushion Shoe"); *L. E. Waterman Pen Co. v. Modern Pen Co.* (C. C. A.) 197 Fed. 534; (C. C. A.) 183 Fed. 118; *Liebig's Extract of Meat Co. v. Liebig Extract Co.*, (C. C. A.) 180 Fed. 688. In fact, even generic descriptive words, such as "Camel's Hair Belting", will be protected by injunction where they have acquired a trade significance, and defendant's manner of using them is deceptive, unfair, or dishonest. *Reddaway v. Banham*, (1896) App. Cas. 199, which has been repeatedly cited with approval in many American cases.

The degree of restraint in any particular case is always commensurate with the necessities of the situation and what commercial morality and fair business dealing may dictate. It depends upon "the exact nature of the injury and the causes that mislead the public."¹ In reconciling the rights of the parties in cases of this kind² so as to permit the defendant to make every proper and honest use of a common term, and at the same time to prevent a misuse of the term unduly and unnecessarily damaging to the prior trader, who first gave the name a value and a significance in the trade, the courts have formulated certain rules which safeguard complainant's rights and yet work no hardship to an honest defendant.³ These rules merely express and enforce the general principle that all men must so use their own as not unnecessarily to damage their neighbor. They are as follows:

(a) The subsequent trader may not use the same name as the market title or short name of his goods, but may use it only in a descriptive manner to announce a fact which he is entitled to state.

(b) The name must be used truthfully by the subsequent trader, or he may not use it at all.

(c) Where the name is necessarily and truthfully used in any sense, it must be accompanied by an explanation sufficient clearly and unmistakably to distinguish defendant's goods from those of complainant.

¹Per Thayer, J., in *Merriam v. Famous, etc. Co.*, 47 Fed. 415.

²*Rowley v. J. F. Rowley Co.* (C. C. A.), 161 Fed. 94.

³Per Lacombe, J., in *Allegretti, etc. Co. v. Keller*, 85 Fed. 643, citing *Baker v. Sanders* (C. C. A) 80 Fed. 895.

Rule I: Use as Short Title Prohibited.

Obviously, where a certain word or phrase has become the short name or market title of one person's goods, the use of the same short name for the similar goods of a rival trader is necessarily deceptive.

"Unless you can defend yourself on the ground that what you are selling is the thing that acquired the name, what possible ground can you have for saying that you are not passing off your thing as his, when you are giving it the name which his goods have borne up to that date?"¹

Therefore, in regulating a defendant's use of such words, equity will not permit him to use them for the purpose of making them also the designating title or name of his goods², but *will confine him to a descriptive manner of use*, which will convey only the meaning he is entitled to convey and will not at the same time suggest that his goods are those of the complainant. This rule has been adopted and enforced in many cases

¹ Per Lord Herschell, in the House of Lords. "*Yorkshire Relish*" case, 14 R. P. C. 720, 727.

² This rule is well stated in the *Bissell Plow* case, 121 Fed. 357, 366, where the court said: "The law has gone further than this, and prescribed a rule by which it can be determined whether what is done by the rival trader is calculated so to deceive such purchasers. That rule is that if what is done by such trader causes his goods to be known in the trade by the same name by which such other goods are already known therein, it is calculated to deceive such purchasers. . . . If, then, the use of any mark that will cause such an effect is an infringement of a technical trade-mark, it would seem to follow that, where no such trade-mark is involved, if what the second comer does in relation to his goods or business will have such an effect, it amounts to unfair competition. As in the other case, it causes his goods to be known in the market by the same name by which the first comer's goods are already known, and hence is calculated to deceive purchasers into buying his goods for that trader's goods, which is the test of unfair competition, as well of infringement of a technical trade-mark. And it has been so held." See also *N. K. Fairbank Co. v. R. W. Bell Mfg. Co.*, 77 Fed. 869.

and is well established. It applies to the use of one's own proper name,¹ to geographical names,² and to generic names.³ All of these classes of names may be used by any one in proper manner to tell the truth about his own goods, but when they have acquired a secondary meaning in association with one man's goods they may not be used by a subsequent trader in such fashion as to make them the short name or title by which his goods are bought and sold in the market, because that manner of use would be deceptive. In other words, while the truth may be told, it must be told in a wholly truthful manner.⁴

Under this doctrine, the defendant in this case would be permitted to say that its "British Empire Dictionary", or "Crown Dictionary" was "based upon Webster's Dictionary of 1847", *if that were the truth*, but it should not be permitted to announce on the wrapper, cover, back or title page of the book, or in advertisements, that its "British Empire Dictionary" or "Crown Dictionary" is in fact *the* "Webster's Dictionary". That is what defendant is doing, and claims the right to do.

¹*Clark Thread Co. v. Armitage* (C. C. A. 2nd Cir.) 74 Fed. 936; *affirming* 67 Fed. 896; *Walter Baker & Co. v. Baker*, 87 Fed. 209; *Walter Baker & Co. v. Sanders* (C. C. A. 2nd Cir.) 80 Fed. 889; *Walter Baker & Co. v. Slack*, 130 Fed. 514; *Bissel Plow Case*, 121 Fed. 357; *International Silver Co. v. Rogers*, 110 Fed. 958 (Roger's Silver Ware); *Reed Cushion Shoe case* (C. C. A. 2nd Cir.) 162 Fed. 887; *Meyer v. Bull*, 58 Fed. 884 ("Bull's Cough Syrup").

²*Oxford University v. Wilmore-Andrews Pub. Co.*, 101 Fed. 443 ("Oxford Bibles"); *Shaver v. Heller* (C. C. A.) 108 Fed. 821 ("American Ball blue"); *Montgomery v. Thompson*, (1891) App. Cas. 217, 64 L. T. N. S. 749 ("Stone Ale"); *Wotherspoon v. Currie*, L. R. 5 H. L. 508, ("Glenfield Starch").

³*Roddaway v. Banham* [1896] App. Cas. 199 ("Camel's Hair Belting"); *Hansen v. Siegel Cooper Co.*, 106 Fed. 691 ("Junket Tablets"); *Williams v. Mitchell*, (C. C. A.) 106 Fed. 168 ("Carrom Board").

⁴*Dr. A. Reed Cushion Shoe Co. v. Frew* (C. C. A. 2nd Cir.) 162 Fed. 887.

In *Walter Baker & Co. v. Baker*, 87 Fed. 209, 210, the court said:

"The well-known *short* name by which the public styles the article of the complainant is 'Baker's Chocolate', and thus the public regards what is presented under that name as the complainant's article, and associates the name with a particular factory of long existence and permanence. The defendant has a right to manufacture chocolate, and to acquire his own reputation under his own name, but not to use the name so as to deceive the purchaser. When he presents his article as 'W. P. Baker's Chocolate', he not only improperly works mischief to the preexisting manufacturer, but he wrongs the public. . . .

"So long as the title contains the words which in the trade and among consumers have come to be the every day designation of complainant's goods, the chocolate so labeled will naturally be assumed to be complainant's, unless special care be taken to indicate that it is not." Citing *Walter Baker & Co. v. Sanders*, 80 Fed. 889.

In *Williams v. Mitchell* (C. C. A.) 106 Fed. 168, complainant's game-board became known by the designation "Carrom Board." The Circuit Court of Appeals said (p. 171):

"The defendants may not rightfully apply that name to their game *as a designation or name of the game*, although they have a right, as the court below decreed, to use the word *in descriptive portions of advertisements so long as they use them in a purely and properly descriptive sense.*"

This is precisely the rule which should govern defendant's use of the name "Webster" in connection with its different dictionaries.

If defendant's dictionary were "based upon"

Webster's Unabridged Dictionary of 1847, that fact might be stated in the form in which it was stated upon the title page of the Crown Dictionary.¹ Such a manner of use could not deceive anyone as to the identity of defendant's book. But where, instead of stating "the whole truth and no less", as respondent was bound to do,² respondent simply entitles its book "Webster's New Standard Dictionary", everyone is likely to be deceived. The use of such a title does not tell what respondent may be entitled to tell, but it does imply and tell an untruth in the sense in which it will be understood by practically the whole public and in which it was plainly intended by the respondent to be understood. One of the best illustrations of the proper form of decree in this class of cases is the one directed by Mr. Justice Harlan and Judge Wood in *Meyer v. Bull*, (C. C. A.) 58 Fed. 884, 886, set out below.³ A similar injunction was directed by this court in the *Chartreuse* case, *Baglin v. Cusenier Co.*, 221 U. S. 580, as follows:

"From using the word 'Chartreuse'
 . . . as the name of, or as descriptive

¹ See Exhibit "Crown Dictionary."

² *Dr. A. Reed Cushion Shoe Co. v. Frew* (C. C. A., 162 Fed. 887.

³ That an injunction issue herein perpetually restraining the defendant, its servants and agents, and all persons in privity with it, from manufacturing and from selling, and from in any manner offering to sell, and from distributing and from in any way disposing of any remedy or preparation to which shall be applied in any form or manner, as the name and designation thereof, the words, 'Dr. B. L. Bull's Cough Syrup', or the words 'Bull's' and 'Cough Syrup', with or without other words, . . . and from in any other form or manner using any name or designation which is calculated to cause its article to be known in the market and sold under the name of complainant's article, or as 'Bull's Cough Syrup'. But the writ of injunction thus to be issued shall not (except as to the name or part of the name thereof, as aforesaid) prohibit the defendant from in every fair and lawful manner stating in the wrappers or labels by it used and otherwise that its article is by it manufactured and sold, and from so fairly and lawfully stating any other fact which it may elect or desire to state."

of, such liqueur or cordial, *or* without clearly distinguishing such liqueur or cordial from the liqueur or cordial manufactured by the complainants."

The argument that respondent has a right to use the title "Webster's New Standard Dictionary" to notify the public that its book is based upon a dictionary of Noah Webster is precisely answered by the Circuit Court of Appeals for the 8th Circuit in *Shaver v. Heller*, (C. C. A.) 108 Fed. 821, 824, where the defendant claimed the right to designate its goods "American Ball Blue" to indicate that they were made in America. The two answers given there are equally conclusive here: (1) An injunction against the use of the name *in the title* will not prohibit the use of the name for the purpose of telling any fact about the book, and (2) the respondent neither needs nor seeks to use the name Webster in its title for this purpose. The same answers were indicated in the "Stone Ale" case¹ where complainant's ale, brewed at the village of Stone, had become known as "Stone Ale". Lord Hannen said:—

"The appellant is undoubtedly entitled to brew ale at Stone, and to indicate that it was manufactured there, but there are various means of stating that fact without using the name which has now become the designation of the respondent's ale."

Rule II: Untruthful Use Prohibited.

Truth is the only possible justification for any use of a confusing name by a newcomer into the market. No trade pirate has ever attempted to appropriate the trade rights of another without at

¹*Montgomery v. Thompson*, (1891) App. Cas. 217.

least some colorable and alleged truthful reason for using the term sought to be appropriated. It is quite true that everyone may use his own name in his business because such use is truthful and necessary; but when the name is not defendant's true name, and has been assumed merely for the purpose of competition, an entirely different question is presented. In such cases, the name must not be employed at all.¹ It is also abundantly settled by authority that the courts will not tolerate a false use of a geographical name, when it is so used to promote unfair competition, and to induce the sale of spurious goods.² Likewise a false use of generic descriptive words will be enjoined.³ Accordingly respondent's false use of the name "Webster's Dictionary" to indicate its reprint of the "British Empire Dictionary" should have been enjoined.

Rule III: Adequate Explanatory Statements Required.

Where a defendant's use of a name may not be absolutely enjoined because its use by defendant is truthful and reasonably necessary, defend-

¹*Royal Baking Powder Co. v. Royal*, 122 Fed. 337, 343, per Lurton, J.; *National Distilling Co. v. Century Liquor & Cigar Co.* (C. C. A. 6th Cir.) 183 Fed. 206; *Hohner v. Gratz*, 52 Fed. 871; *Liebig's Extract of Meat Co. v. Libby, McNeill & Libby*, 103 Fed. 87, 90; *Pinet v. Maison Pinet*, 14 Rep. Pat. Cas. 933; 15 Rep. Pat. Cas. 65; *Smail v. Sanders*, 118 Ind. 105, 20 N. E. Rep. 296.

²*Collinsplatt v. Finlayson*, 88 Fed. 693, per Lacombe, J.; *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 86 Fed. 608; *Canal Co. v. Clark*, 13 Wall. (U. S.) 311, 326; *Elgin National Watch Co. v. Loveland*, 132 Fed. 41; *City of Carlsbad v. Kutnow*, 68 Fed. 794.

³*Singer Mfg. Co. v. Hipple*, 109 Fed. 152 ("Singer Sewing Machine"); *Jaffe v. Evans*, 70 App. Div. (N. Y.) 190 ("Lanoline"); *Liebig's Extract of Meat Co. v. Liebig Co.* (C. C. A., 2nd Cir.) 180 Fed. 688, 690 ("Liebig's Process"); *Janney v. Pancoast Ventilator, etc., Co.*, 128 Fed. 121 ("Pancoast Ventilators"); *Jacobs v. Beecham*, 221 U. S. 263 ("Beecham's Pills").

ant must accompany his use of the name with an affirmative explanatory statement adequate clearly and unmistakably to distinguish his goods from those of the prior trader. A use of the bare name, without such explanatory statement amounts to an artifice intended and sufficient to deceive, and will, therefore, be enjoined as fraudulent. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169; *Merriam v. Saalfeld*, 198 Fed. 369.

The courts are stringent in their requirements of plain, adequate and unmistakable distinguishing statements in this class of cases, as will appear from the following cases, containing judicially approved forms of distinguishing statements which defendants have been required by injunction to use: *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169; *Elgin Nat'l Watch Co. v. Illinois Watch Co.*, 179 U. S. 665; *Herring-Hall-Marvin Safe Co. v. Hall Safe Co.*, 208 U. S. 554; *French Republic v. Saratoga Vichy Co.*, 191 U. S. 427; *Ludlow Valve Mfg. Co. v. Pittsburgh Mfg. Co.* (C. C. A.), 166 Fed. 26; *Dr. A. Reed Cushion Shoe Co. v. Frew* (C. C. A.) 162 Fed. 887; *Allegretti, etc., Co. v. Keller*, 85 Fed. 643; *Baker v. Sanders* (C. C. A.), 80 Fed. 889, 895.

The refusal of the court below to at least require respondent to use an adequate distinguishing statement is contrary to the settled doctrine of this court, and to the uniform decisions of other circuits.

III.

WEBSTER'S DICTIONARY DECISIONS.

Petitioner's paramount, though not exclusive, rights in the name "Webster" have been many times judicially declared, and its right to protection adjudged.

Merriam v. Holloway, 43 Fed. 450, was the first of a series of cases involving petitioner's rights in the word "Webster" as applied to dictionaries. This suit was brought in the year 1890, at a time when the doctrine of unfair competition, as distinguished from the law of technical trade-marks, was just beginning to be recognized. The name unfair competition had not yet been applied to this branch of law, and the bench and bar still spoke largely in the language of trade-marks. The copyright upon the 1847 edition of Webster's Dictionary had then recently expired. Complainant had been publishing for many years the 1864 edition of Webster's Dictionary. Defendant undertook to publish and sell a *photolithographic copy of the 1847 edition*, calling it simply Webster's Dictionary. Complainant filed a bill for an injunction upon the ground that defendant was selling the expired 1847 edition as and for complainant's copyrighted 1864 edition, and that the public were deceived. An exclusive trade-mark right in the title Webster's Dictionary was claimed. A general demurrer was overruled by Mr. Justice Miller, sitting at circuit. Speaking of the right to publish the expired copyright book under the name of Webster's Dictionary, Justice Miller said:

"I want to say, however, with reference to the main issue in the case, that it occurs

to me that this proceeding is an attempt to establish the doctrine that a party who has had the copyright of a book may continue that monopoly indefinitely, under the pretense that it is protected by a trade-mark, or something of that sort. I do not believe in any such doctrine, nor do my associates. When a man takes out a copyright, for any of his writings or works, he impliedly agrees that, at the expiration of that copyright, such writings or works shall go to the public and become public property. . . . If a man is entitled to an extension of his copyright he may obtain it by the mode pointed out by law. The law provides a method of obtaining such extension. The copyright law gives an author or proprietor a monopoly of the sale of his writings for a definite period, but the grant of a monopoly implies that after the monopoly has expired the public shall be entitled ever afterwards to the unrestricted use of the book.

“There is some hesitation among my brethren and myself, as above indicated, whether, taking the bill as a whole, and considering all of its averments, a general demurrer ought to be sustained. The defendants use the words ‘Webster’s Dictionary,’ or ‘Webster’s Unabridged Dictionary,’ placed in the same relation to their publication that the complainants place it. The date of defendants’ publication on the title-page is given as of the year 1890, when, in point of fact, *the books that they are publishing is a reprint or a photo-lithographic copy of the edition of Webster’s Dictionary of 1847.* The defendants also use the device of an open book on advertisements and circulars, relating to their publication, as before alluded to. Now, taking all of these allegations

together, *there may be some evidence of a fraudulent intent on defendants' part to get the benefit of the reputation of the edition of Webster's Dictionary which the complainants are publishing*, and it may possibly be that, in consequence of the facts averred, the public are deceived, and that the complainants are damaged to some extent. We think, therefore, that this is one of those cases, as the facts are stated in the complaint, where the interests of justice would be best subserved by requiring the defendants to answer, so that there may be a full and fair investigation of the law and the facts upon a final hearing.

"The demurrer in this case, as we understand it, is not to special portions of the bill, or particular allegations, but goes to the whole bill, and asserts that it contains no averments warranting equitable relief of any sort. We are unable, at this time, to fully assent to that view; but, at the same time, we do not wish to be understood as declaring definitely that the complainant is entitled to equitable relief. I will say this, however, that the contention that complainants have any special property in 'Webster's Dictionary' is all nonsense, since the copyright has expired. What do they mean by the expression 'their book,' when they speak of Webster's Dictionary? It may be their book if they have bought it, as a copy of Webster's Dictionary is my book if I have bought it. But in no other sense than that last indicated can the complainants say of Webster's Dictionary that it is their book."

The doctrine of this case is that the name "Webster's Dictionary" is not a trade-mark, and that complainant has no special property in the book upon which the copyright has expired; that the

name Webster's Dictionary may be used by anyone *as the name of a genuine "Webster's Dictionary" whose copyright has expired*; but that no one has a right to deceive the public into purchasing a copy of the obsolete expired book in the belief that it is the later copyrighted edition of the complainant. This is common sense and sound law. Nothing to the contrary is now claimed. But it is a grotesque misapplication of Justice Miller's remarks to cite them in support of what respondent did in this case, viz:—importing a British dictionary, changing its title to Webster, and passing it off as the different, current, established, and copyrighted dictionary of petitioner. No special property in the expired edition, and no trade-mark in the title is needed to support a bill for relief against such a fraud. It is admitted that defendant, and all the world, may make an unrestricted use of the expired 1847 edition, either in whole or in part. All that is insisted upon or claimed in this suit is that no one may sell such literary matter, and *a fortiori* wholly different and variant literary compilations, as and for the petitioner's long established and later copyrighted editions.

Merriam v. Famous Shoe & Clothing Co., 47 Fed. 411, was the second in this series of cases involving complainant's rights in the name Webster. This case also was decided on demurrer to the bill, which was overruled. The decision was rendered in the year 1891. In that case the defendant began to publish *a reprint of the expired 1847 edition*, calling it Webster's Dictionary, and in size, shape and outward appearance resembling the complainant's copyrighted 1864 edition. The defendant described and advertised its books as

"Webster's Dictionary. Famous Reprint Edition. A \$12.00 Book for \$1.45." The bill prayed an injunction restraining the defendants from selling any reprint of the expired 1847 edition under a name and in a dress resembling complainant's 1864 edition and from using dates and devices thereon calculated to pass off defendant's dictionary as and for the dictionary published by complainant. In overruling the demurrer, Judge Thayer said:

"I have no doubt that the defendant is entitled to use the words 'Webster's Dictionary' to describe the work that it is engaged in publishing and selling. *Those words were used to describe Webster's Dictionary of the edition of 1847, and, as the copyright on that edition has expired, it has now become public property. Any one may reprint that edition of the work, and entitle the reprint 'Webster's Dictionary.'* The latter words, which appeared on the title page and on the outer cover of books of the edition of 1847, have become public property, as well as other parts of the work. Defendant's right to call the 'Famous Reprint Edition' 'Webster's Dictionary,' is as clear as the right of complainants to give that title to books of the edition of 1864, which they are now publishing." . . .

"But in some other respects the bill, in my judgment, discloses adequate cause for complaint. In the 'Famous Reprint Edition,' it seems that the defendant has omitted a portion of the preface contained in Webster's Dictionary of the edition of 1847, so that *the reprint fails to disclose on its face that it is in reality a copy of the edition of 1847 and not a copy of the enlarged edition of 1864.* . . . It is unnecessary

at this time to determine what form of relief should be administered, if the allegations of the bill are proven on final hearing. It may be that some change in the form of defendant's circulars and advertisements will be all the relief that the circumstances of the case fairly warrant; or it may be that the proof will *warrant an order that the defendant place a notice in their book that it is a reprint of the edition of 1847 of Webster's Dictionary*, with such additions as they have made to it. This is a matter, however, to be considered, on final hearing, when the exact nature of the injury, and the causes that mislead the public, are ascertained. It is sufficient to say at present that, on the showing made, the complainants are entitled to relief, and the demurrer to the bill is accordingly overruled."

Here again it was held that petitioner was entitled to an injunction against the selling of the expired 1847 edition in a make-up, and in connection with advertisements which tended to deceive the public into buying said 1847 edition of defendant as and for the later copyrighted edition of the complainant. It is also to be noted that *the holding that defendant was entitled to use the name "Webster's Dictionary" was limited to a use upon a copy of the expired 1847 edition*. There is no hint that the defendant would have been entitled to use that name upon a substantially different book. Such use would be a false description.

Merriam v. Texas Siftings Pub. Co., 49 Fed. 944, was the third in this series of cases involving Webster's Dictionary. This case was decided at final hearing upon pleadings and proof in the year 1892. Like the previous cases it involved a

photographic reprint of the expired 1847 edition. The record there was filled with misleading advertisements of the same character as those in the present case. These advertisements were of course enjoined. Judge Shipman said:

"Upon the preceding facts the law has been recently stated with clearness. (*Merriam v. Publishing Co.*, 43 Fed. Rep. 450; *Merriam v. Shoe, etc., Co.*, 47 Fed. Rep. 411; *Black v. Ehrich*, 44 Fed. Rep. 793.) The plaintiffs are not entitled to an exclusive use of the name 'Webster's Dictionary' upon copies of editions the copyrights of which have expired, for the name is not a trade-mark. Mere copies of the edition of 1847 and 1859 can be reproduced by a publisher, over his own name, provided he makes no misrepresentations to induce the public to believe that it is another book, the right to publish which is the exclusive property of the plaintiff. The mere form or size of the volume in which Webster's Dictionary has ordinarily appeared, does not, in the mind of the public, connect the plaintiffs with the manufacturer of the dictionary, and there is no characteristic of a trade-mark in such ordinary form or size. A court of equity would not probably hold that the mere act of the publication of this book, taken by itself, disconnected from any other representations or advertisements, or advertised for what it actually is, would be the subject of an injunction, upon the ground that such act was an unlawful competition in trade. The gist of this case consists of the fact that the defendant, in its attempts to sell the book, made free and ingenious use of misrepresentations, which were intended and calculated to mislead the public into a belief that the book was the one which had long been produced and

sold by the plaintiffs. That such was the natural effect of the defendant's advertisements cannot be doubted. 'Wrongs of this description, whereby, through an artifice of any sort, the goods of one manufacturer become confused in the public mind with the goods of some other manufacturer, may be redressed by a court of equity.' (*Merriam v. Shoe, etc., Co., supra.*) The defendant should be enjoined against the circulation or use of advertisements or circulars which tend to misrepresent the character of the Ogilvie edition of Webster's Dictionary, or lead the public into the belief that it is a reproduction of a modern edition of that work, and especially against the use of the advertisements which are in evidence in this case, or of similar advertisements. If the book had not been advertised in the manner which has been described I should not think it proper to require the defendant to place any notice in the volume itself; but, inasmuch as these advertisements have been extensively circulated, and orders for the book may hereafter be received by the defendant, which will be the fruit of the advertisements, each book delivered by it or its agents should *contain a notice*, by printed slip attached to the title page, *that it is a reprint of the edition of 1847 of Webster's Dictionary*, with a list of the additions that have been made thereto, and which the book contains."

It thus appears that the right of complainant to be protected against a passing off of the 1847 edition as and for the later copyrighted editions of complainant was here again declared and protected. It is also to be noted that the defendant's book was *a photolithographic copy of the genuine 1847 edition* of Webster's Dictionary

and it was, therefore, truthfully entitled "Webster's Dictionary." The Court also called attention to the necessity of defendant's book being "*advertised for what it actually is.*" In accordance with the suggestion of Judge Thayer in the previous case, Judge Shipman required the defendant to place a printed notice in each one of its books stating "that it is a reprint of the edition of 1847 of Webster's Dictionary with a list of the additions that have been made thereto and which the book contains." Of course nothing less should be required in the case at bar.

Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 191, 192, was decided by the Supreme Court in the year 1895. It construed and applied the doctrine of the preceding Webster Dictionary cases, and held that the name of a patented article might be used by any one as the name of that article, after the patent has expired, provided it is used in such a manner as not to mislead the public. After quoting from the foregoing dictionary cases, the Court said:

"Although the right to use the words was thus adjudged, the duty not to deceive by the method of their employment was upheld and enforced. . . . In *Merriam v. Famous Shoe and Clothing Co.*, 47 Fed. 411, a similar ruling to that announced by Mr. Justice Miller was made. But although the right to use the word 'Webster's Dictionary' was sustained, the obligation to so use as not to mislead was again stated, Thayer, J., saying," etc.

The Supreme Court in this case *added one very important qualification to the doctrine announced in the dictionary cases.* The dictionary cases had apparently held that the name might be used,

provided there was no affirmative false or fraudulent representations. In the *Singer* case the Supreme Court held that the use of such a name, *simpliciter*, was deceptive, and hence such names might be used by subsequent traders, only when accompanied by adequate, affirmative, explanatory statements sufficient to unmistakably prevent deception. The holding of the *Singer* case was that the name of a patented article, if accompanied by such explanatory statements, might be used as the name of articles *made in accordance with the expired patent*. It did not hold that the expiration of a patent authorized the name of the patented article to be applied to some other different competing article, any more than the previous dictionary cases had held that the expiration of a copyright authorized the name of the book to be applied to some other different competing book. This point is the crux of the present case, and is further considered hereafter. (See *post*, pp. 39-50).

G. & C. Merriam Co. v. Straus, 136 Fed. 477, decided in 1904, was a bill for an injunction to restrain the use of the name "Webster" in the title of certain small dictionaries. The bill was, in all essential respects, identical with the present bill. The defendant filed a plea setting up expiration of copyright upon the early edition of Webster's Dictionary as a bar to relief. The plea was set down for an argument as to its sufficiency in law, and was overruled. Judge Wallace said:

"The facts set forth in the bill present a case of unfair competition in trade by the defendants, arising from the manner in which they have used the word 'Webster's,' to lead the public to believe that their dictionaries are the dictionaries which are produced and manufactured by the com-

plainants. The plea is a purely negative plea, except that it sets forth facts which show that the word as applied to dictionaries which reproduce the definitions of which Noah Webster was the author was *publici juris*, as a generic descriptive term for such dictionaries, at the time of its alleged wrongful use by them. The plea does not deny explicitly the averments of the bill which assert that the term when used on such dictionaries had acquired a meaning in the trade and with the public as signifying editions which were the product of the complainants, and assert that the defendants have used the word without any qualifying descriptive matter tending to show that their dictionaries are not the product of the complainants. If these averments are true, the word had acquired a *secondary meaning*, and the complainants are entitled to protection against the misleading use of it, notwithstanding the defendants are at liberty to use it in a manner which distinguishes their dictionaries from those of the complainants. Because the denials in the plea do not fully meet the averments in the bill of evidential facts which should be either traversed or admitted, the objections to the plea are well taken.

“ It is proper, however, to say that the bill is in part an attempt to protect the literary property in the dictionaries which became *publici juris* upon the expiration of the copyrights. This attempt must prove futile. But there may be a commercial property in books as well as a literary property, and when a publisher has imparted to his books peculiar characteristics which enable the public to distinguish them from

other books embodying the same literary property, and to recognize them as his particular product, there is no reason why the principles which interdict unfair competition in trade should not afford him protection against the copying of the characteristics by rivals. *So far as the bill proceeds upon this theory it presents a meritorious case."*

This is a square cut decision that complainant is entitled to an injunction against a misleading manner of using the name "Webster" notwithstanding complainant has not an exclusive right to the word, and notwithstanding every one is at liberty to use it in a manner which distinguishes their dictionaries from those of the complainant. That is the precise doctrine here contended for, and petitioner again disavows any attempt or purpose to protect literary property which has become *publici juris* by the expiration of copyright. Such property may be used, but may not be misrepresented as being the same literary property as that sold by petitioner.

Merriam v. Ogilvie, 149 Fed. 858, 159 Fed. 638, 170 Fed. 167, involved the book variously known as Webster's Universal Dictionary, Webster's Imperial Dictionary, and other similar names. It was originally instituted by Ogilvie to restrain the Merriam Company from issuing circulars claiming *an exclusive right* in the word "Webster" as applied to dictionaries, and threatening Ogilvie's customers with suits for infringement. Petitioner filed a cross-bill to restrain Ogilvie from using the name Webster's Imperial Dictionary and from issuing fraudulent and deceptive advertisements, upon the ground of un-

fair competition. The case was brought to a final hearing upon full proofs.

The Circuit Court (149 Fed. 858) found upon the evidence that the word Webster had acquired a secondary meaning, and indicated to the public dictionaries published by petitioner. Judge Colt said:

"The evidence also shows that the Merriam Company, and its predecessors in title, G. & C. Merriam & Co., and G. & C. Merriam, have been the publishers of Webster's Dictionaries for more than 50 years, having acquired all the rights in Webster's Dictionary from the heirs of Noah Webster previous to 1847, and that since that time they have published numerous editions of this work.

"It further appears from the evidence that from 1847 to 1889 the Merriams were the sole publishers of Webster's Dictionaries and that in 1889 the name 'Webster,' as applied to dictionaries, had acquired a secondary meaning, and indicated to the public the dictionaries published and sold by the Merriam Company. It further appears that, since the expiration of the Merriam copyright in Webster's Unabridged Dictionary in 1889, various editions of Webster's Dictionary have been published and sold by other publisher's; but, notwithstanding this circumstance, *it is shown by a preponderance of evidence that the name 'Webster' still indicates to the public the dictionaries published and sold by the Merriam Company.*

"We have, then, to inquire what are the rights of Ogilvie with respect to the use of the name 'Webster' upon dictionaries after the expiration of the Merriam copyright in

1889; it appears that the name 'Webster' has a two-fold signification, in that it is the generic name of the dictionary, and also indicates to the public the dictionaries published and sold by the Merriam Company."

Judge Colt then held that with the expiration of the copyright "the book and the name by which it is designated are dedicated to the public." Adding:

"To say that the public have the right to publish the book and not the incidental right to use the name by which it is known, is in effect to destroy the public right and to perpetuate the monopoly. . . . It follows, therefore, as a necessary result that at the expiration of a copyright any person has the right to publish the copyrighted book and to call it by its generic name. . . .

"It follows in the case at bar that Ogilvie, upon the expiration of the Merriam copyright has the right to publish the copyrighted book, or a revised edition thereof, and to call it 'Webster's Dictionary,' or 'Webster's Imperial Dictionary,' provided that he clearly indicates to the public that it is a Webster's Dictionary published by him, and not a Webster's Dictionary published by the Merriam Company."

It is believed that a right to call even a revised edition "Webster's Dictionary" does not follow logically from the right to republish the expired book and call it by its name, Webster's Dictionary, but it is a misnomer to call respondent's book a revised edition because it is a totally different book with a different name and identity of its own.

Judge Colt then held that the mere use of Ogilvie's own name in the publisher's imprint was

sufficient to distinguish his book from that of complainant, and he refused to grant any injunction against the book itself. He held, however, that Ogilvie's advertisements were intentionally fraudulent and deceptive, and that Ogilvie intended to deceive purchasers into buying his dictionary for one of complainant's series of dictionaries. Upon this subject he said:

"With respect to the Ogilvie circulars and advertisements the case is quite different. It is evident that these circulars and advertisements are misleading and deceptive. They convey the impression that the Ogilvie book is a new edition of Webster's Dictionary published by the Merriam Company, and that it is the successor of Webster's International Dictionary; and further Ogilvie has taken portions of the printed matter in the circulars and advertisements of the International Dictionary, and inserted them in his circulars and advertisements. All this goes to show the *intention of Ogilvie to trespass upon the reputation of the Merriam Company, and to deceive purchasers* into purchasing his dictionary for one of the series of Webster's dictionaries published by the Merriam Company. It is clear, therefore, that Ogilvie should be enjoined from sending out these circulars and advertisements in their present form. These circulars and advertisements should be so reformed as not in any manner to convey the impression that Ogilvie is the successor of the Merriam Company, or that his book is a new edition of any of the series of Webster's Dictionaries published by the Merriam Company."

From this decree the Merriam Company took an appeal to the Circuit Court of Appeals for the

First Circuit claiming relief against the book itself. This appeal was decided January 30, 1908, in an opinion written by Judge Aldrich. The Court of Appeals affirmed the holding of the Circuit Court that owing to expiration of copyright, the Merriam Company had no exclusive proprietorship in the name "Webster." It held, however, that the public's right to use the name "Webster" was "subject to a certain and well understood limitation or condition, namely, that the public right to use shall be so exercised as not to deceive members of the public, and lead them into the belief that they are buying the particular or identical thing which was produced under the copyright." The Court said:

"The reasoning of the *Singer* case, which we think applies here, is that the name must be accompanied by such indications as will unmistakably inform the public that the thing is something put out by the particular party who appropriates it and exercises the public right.

"If the title page of the Ogilvie dictionaries had contained, for instance, the words 'Webster's Dictionary, published by George W. Ogilvie,' *with other expressions correctly indicating the identity of the publication*, the Merriam Company would have no just cause for complaint. But such is not this case. . . .

"Where another avails himself of the principle of public dedication, *he must in good faith fully identify his production and clearly disassociate his work* from the work of the one who has given significance to the name, and sufficiently direct the mind of the trading public to the fact that, though the thing is of the same name, it is something

produced and put upon the market by himself.

"Use of a manufacturer's or producer's true name alone would not always suffice as an unmistakable designation and especially where artifice and bad faith are present. . . .

"The designation must be efficient and ample under the particular circumstances of a given situation."

Accordingly the Court of Appeals reversed the holding of the Circuit Court that Ogilvie's book was sufficiently distinguished from complainant's book.

The case was accordingly remanded to the Circuit Court with directions "that the injunction against George W. Ogilvie, his agents, attorneys and servants, be so enlarged as to include the title pages and backs of the dictionaries in the present form or in any form calculated to deceive members of the public into purchasing his dictionary under the belief that it is a Merriam's Webster Dictionary, and for further proceedings" not inconsistent with the opinion. Upon this mandate, Judge Colt in the Circuit Court entered a decree reading as follows:

"3. That a perpetual injunction issue in this suit restraining the complainant, George W. Ogilvie, his agents, attorneys and servants, and all others claiming or holding through or under him, from publishing or issuing the title pages and the backs of the dictionaries in the present form, or in any form calculated to deceive members of the public into purchasing his dictionary under the belief that it is a Merriam Webster's Dictionary."

As this decree plainly did not conform to the mandate and opinion of the Court of Appeals, a

second appeal, upon the same record, was perfected.

This second appeal was determined on March 17, 1909 (170 Fed. 167). Judge Putnam said:

"This is the same case in which an opinion was passed down by us, and judgment entered, on January 30, 1908. 159 Fed. 638. A decree was entered in the Circuit Court pursuant to that judgment, with which the Merriam Company is dissatisfied as not giving it all the relief which the case demands. The objections are two. The first is that the Circuit Court did not insert in the decree what corresponds to what appears in the judgment in *Singer Co. v. June Co.*, 163 U. S. 169, 204; 16 Sup. Ct. 1002; 41 L. Ed. 118, to the effect that the corporation proceeded against was enjoined from using the word 'Singer' without clearly and unmistakably specifying, in connection therewith, that its machines were made by it, and were not the product of the complainant. We may also refer to the more specific corresponding provision in the judgment in *Hall's Safe Co. v. Herring Safe Co.*, 146 Fed. 37, 44; 76 C. C. A. 495; 14 L. R. A. (N. S.), 1182, as modified by the Supreme Court in *Herring-Hall-Marvin Safe Co. v. Hall Safe Co.*, 208 U. S. 554, 560; 28 Sup. Ct. 350; 52 L. D. 616. This precise pointing out was not in terms provided for in the judgment of this court. Therefore, it would not be strange that the Circuit Court omitted it unless its attention was expressly called to it; and the record does not show that this was done. On the case being developed here, we conclude that the decree should be amended by directing that the following words be

inserted by Ogilvie, and those who may succeed him, namely, 'This dictionary is not published by the original publishers of Webster's Dictionary, or by their successors,' and that, of course, these words should clearly and unmistakably appear in the title page of every volume published by the respondent, Ogilvie, or his successors or assigns, of the class to which this litigation relates. *It is not for us to go further than this in directing the precise details which may be necessary to make the decree effective in this particular. It is impossible for the Appellate Court to foresee what changes future emergencies may require; therefore, as usual, whatever may be required further, if anything, for that purpose, must be worked out by the Circuit Court.*"

Thereupon the case was again remanded to the Circuit Court and on April 21, 1909, a decree for an injunction in the following form was entered:

"That a perpetual injunction issue in this suit, restraining the cross-defendant, George W. Ogilvie, his agents, attorneys, servants, employes, and all persons claiming or holding through or under him from using as the name or title of his said dictionaries described in the amended cross-bill herein, to which this litigation relates, the words, 'Webster's Dictionary,' or 'Webster's Imperial Dictionary,' or 'Webster's Universal Dictionary' or any equivalent thereto, upon the title page, or upon the back or cover of said dictionaries, or in any advertisement, circular, notice or announcement referring to said dictionaries, unless accompanied by the following statement plainly printed upon the title page, and in each said advertisement, circular, notice or announcement, namely: 'This

dictionary is not published by the original publishers of Webster's Dictionary or by their successors," and especially from publishing or issuing in their present form, the title pages and the backs of his said dictionaries and the circulars and advertisements in this suit adjudged misleading or deceptive, or any other form of title page, back, circular or advertisements, that is in any way calculated to deceive purchasers into purchasing complainant's dictionary under the belief that it is a Webster's Dictionary, published by the G. & C. Merriam Company."

Merriam v. Saalfeld (C. C. A., 6th Cir.), 190 Fed. 927; 198 Fed. 369, is the latest decision in regard to the name "Webster." It again upheld the complainant's prior and paramount rights and declared Ogilvie's successor guilty of fraud. The case was complicated with the doctrine of *res adjudicata*, and "for conformity's sake" the Court directed an injunction in the same form as was directed in the prior *Ogilvie* case, but it was expressly held that this form of injunction was not necessarily the form to be used for all time even against Ogilvie's successors. A *rehearing* was had in this case, and in an opinion filed July 17, 1912, (198 Fed. 369), complainant's rights were again declared with emphasis. It was found that the term "Webster's Dictionary" indicated to the public that a book so named or marked was the Merriam book, and that this was now in fact the "*primary*" meaning of that term. An injunction and an accounting of defendant's profits were ordered in favor of the Merriams.

Upon this rehearing the Circuit Court of Appeals for the Sixth Circuit reviewed and inter-

preted the decisions in the First Circuit in the *Ogilvie* case, Judge Denison saying:

"In the decisions upon this case in the First Circuit the opinions of the courts only undertook to apply to the facts of the case rules and adjudications that were assumed to be familiar. The interpretative conflicts which have arisen seem to make it *advisable to ascertain, somewhat more completely* than those courts thought their statement necessary, *the principles which underlie those decisions.*"

The nature of the petitioner's rights in the name "Webster" were thus indicated:

"Whether it is the name of a formerly (but no longer) patented article, or is the title of a book with expired copyright, it has become the maker's or the publisher's token, and differs from a technical common law trade-mark mainly, if not wholly, in the fact that the proprietor's right is *not of absolute but of qualified exclusion.*"

Upon the question of expiration of copyright the Court said:

"The situation arising under an expired patent or copyright cannot be differentiated from that arising with reference to any other descriptive word. There can be no trade-mark or similar exclusive right in what has been, during the life of the patent or copyright, the name of the patented article or copyrighted book, not because of any particular rule of trade-mark or patent law, but because the word, during the term of the monopoly, has come to be a word of apt description. It has come to be the name of the thing, and hence any one who later makes the thing may call it by its true name. Neither is there anything peculiar in the application

of the secondary meaning theory to this class of cases. It is to be applied just as with reference to any descriptive word, and if, after the word comes into existence and becomes free to the public as the name of the thing, it is used by one manufacturer so long and so exclusively that it comes to be, to that part of the public, indicative that it is his product, he is entitled to protection for the same reasons, in the same way and to the same extent as held with reference to 'Camel's Hair Belting' (*Rad-daway v. Benham*, App. Cas. 1896, p. 199), 'Glenfield Starch' (*Wotherspoon v. Currie*, L. R. 5 H. L. 508), 'Elgin' or 'Waltham' Watches (*Elgin Co. v. Illinois Co.*, *supra*; *Am. Watch Co. v. U. S. Watch Co.*, 173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826, 73 Am. St. Rep. 263), or 'Hall's safes' (*Herring, etc., Co. v. Hall, etc., Co.*, 208 U. S. 554, 28 Sup. Ct. 350, 52 L. Ed. 616).

"Exactly so, and of necessity, with regard to this copyrighted book."

In other words the right to use the name is limited to one who later makes the thing and calls it by its true name. In the case at bar *defendant does not make the thing, i. e.*, it does not publish the book upon which the copyright has expired, and, hence, *it is not calling its book by its true name*. The true name of defendant's book is the British Empire Dictionary—not Webster's Dictionary.

The decisions below permitting defendant to call its book Webster's Dictionary, without even requiring any explanatory statement, is erroneous and in conflict with every prior Webster Dictionary decision. In the interest of justice and uniformity of decision a writ of *certiorari* should be granted.

IV.

DOCTRINE OF THE SUPREME COURT IN THE
SINGER AND OTHER LIKE CASES.

The doctrine of the *Singer* cases (163 U. S. 169 and 205) was the doctrine applied in the three early *Webster dictionary* cases (43 Fed. 450; 47 Fed. 411; 49 Fed. 944), and it in no way conflicts with the rules which have been stated in respect to the use of generic names which have become trade-names. This doctrine is, in fact, an illustration of the correct application of those rules. During the life of the patent or copyright, the name of the article or book is the generic name of the thing and is not a trade-mark, because it is descriptive of the thing. It may, therefore, be used by any one, even during the life of the patent or the copyright, who deals in that specific thing, because that is making a truthful use of the name. *Johnson v. Seaman* (C. C. A.), 108 Fed. 951; *Vitascope v. U. S. Phonograph Co.*, 83 Fed. 30. But although the name of a copyrighted book or patented article is not a trade-mark, no one may apply that name to a different competing article or book, because this would be a false description tending to pass off such different goods as being the patented article or copyrighted book. *Shook v. Wood*, 10 Phil. (Pa.) 373; *Janney v. Pancoast Ventilator Mfg. Co.*, 128 Fed. 121; *Adam v. Folger*, 120 Fed. 260; *Hoffman v. B. Kuppenheimer*, 183 Fed. 597; *In re Palmer's Trade-Mark*, L. R. 24 Ch. Div. 504. The only effect of the expiration of the copyright or the patent is to enable every one to make the genuine article, and if he does make

such article, he may call it by the generic name which it has always been known by. *Singer Mfg. Co. v. June Mfg. Co.* 163 U. S. 169; *Merriam v. Famous, etc.*, 47 Fed. 411; *Merriam v. Texas Siftings Co.*, 49 Fed. 944; *Merriam v. Holloway*, 43 Fed. 450; *Black v. Ehrich*, 44 Fed. 793. If, however, long use during the statutory monopoly, or afterwards, has given the name a secondary meaning indicating that all goods bearing that name are the product of the original proprietor, the subsequent maker of the goods and user of the name must accompany the name with an explanatory statement adequate unmistakably to distinguish the goods. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169; *Ludlow Valve Mfg. Co. v. Pittsburgh Mfg. Co.* (C. C. A.), 166 Fed. 26. Neither a patent nor a copyright confers any exclusive right to any particular name, but only confers the exclusive right to make and sell the article or book to which that name is applied. *Centaur v. Heinsfurter*, 84 Fed. 956, per Mr. Justice Brewer; *Harper v. Ranous*, 67 Fed. 904, per Lacombe, J.; *Corbett v. Purdy*, 80 Fed. 901. There is never any exclusive right or property in such names, and consequently no monopoly in them which may expire, and thus increase the common right. *Black v. Ehrich*, 44 Fed. 793; *Atlas Mfg. Co. v. Street & Smith*, 204 Fed. 403. The name is just as much generically descriptive, and *publici juris*, during the life of the monopoly as afterwards. The only reason why others may not use the name before expiration of the copyright or patent is because they cannot use it truthfully. The only reason why others may use the name after expiration of copyright or patent is because they may

and do use it truthfully. If they do not use it truthfully, they may not use it at all.

Unless the expiration of copyright upon one book justifies appropriation and application of its name to another and different book, respondent cannot justify its use of the name "Webster", for it has applied that name to its old "Crown" or "British Empire Dictionary." No authority can be found in the books which will justify such a practice.

In the *Singer* cases, the defendant claimed to be, and was, selling the distinctive type of sewing machines known as "Singer" originally manufactured under letters patent then expired, but there was no contention, and the court did not even remotely intimate, that the name "Singer" could be used upon a sewing machine of a different type. The contrary was plainly implied, and has been since often decided by other courts.

In *Singer Mfg. Co. v. Hippie*, 109 Fed. 152 (May 1901), Circuit Judge Dallas granted a sweeping injunction because the sewing machine sold by the defendant was not in truth a "Singer". After discussing the decision of the Supreme Court, the learned judge continued as follows (at p. 153):

"If, therefore, the defendant's article were in fact a 'Singer' machine, she would be at liberty to so designate it, provided she also clearly and unmistakably specified that it was not the product of the Singer Company; but the evidence, as I view it, is against her upon the main point, and therefore her manner of marking need not be considered. The machine which she puts upon the market is not a 'Singer'. That word is not, as a name for it, either

necessary or appropriate. Nor can I accede to the contention that her machine is a developed or improved 'Singer'; for the proof is that it is of a distinct type which is and long has been known as the 'Domestic'. Consequently the defendant's employment of the word 'Singer' can have but one result, and that is, not to correctly identify the thing itself, but to mislead the public as to its source of origin; and, this being so, the decision in *Singer Mfg. Co. v. June Mfg. Co.* does not support, but subverts, her present position."

This decision is directly in point. Respondent's dictionary is not a "Webster's Dictionary," in either the historical or current sense of the term. It is neither the obsolete nor the modern Webster's Dictionary as known to the purchasing public. Consequently its use of those words, "*as the name for it,*" can have but one result, and that is, not to correctly identify the book itself, and to mislead the public both as to its identity, and the source of its origin. Accordingly, the use of that name, *as a name for the thing* should be enjoined.

In *Jaffe v. Evans*, 70 App. Div. (N. Y.), 190, the Supreme Court of the State of New York held that as the patent upon the article known as "Lanoline" has expired, the defendant was entitled to use that name "*provided its preparation is substantially the same product as plaintiff's,* and the word is accompanied with *indicia* which show clearly that the defendant is the manufacturer." The Court added:

"This necessarily includes the other proposition that the defendant has no right to manufacture something entirely different, and call it 'Lanoline,' nor would it have

the right to use that name in advertisements or labels in such a way as to deceive the public into thinking its product was the one manufactured by the plaintiff."

Respondent is doing, with the sanction of the decision below, precisely what is here said may not be done.

In the "*Castoria*" cases it was held that the expiration of the patent upon the medicine called "*Castoria*" authorized every one to make that medicine and call it by the name of "*Castoria*," but in every instance the right was strictly limited to a use of that name upon a preparation made according to the original expired patented process or formula. *Centaur Co. v. Heinsfurter* (C. C. A.), 84 Fed. 955; *Centaur Co. v. Neathery* (C. C. A.), 91 Fed. 891, 900; *Centaur Co. v. Killenberger*, 87 Fed. 725, 727. A different medicine could not, of course, be called "*Castoria*." The *Beecham* case, 221 U. S., 263, is conclusive upon that point.

In *Jacobs v. Beecham*, 221 U. S. 263, 31 Sup. Ct. Rep. 555 (decided May 15, 1911), the Supreme Court directly held that the generic name of a medicine, made under a secret formula, *although not a trade-mark*, might not be used as a name of a similar medicine not made in accordance with said formula. It also held that in such a case *the burden of proof rests upon the defendant to justify his use of the name by showing affirmatively that his goods are made in accordance with the original formula*, and further, that defendant's use of the name is not saved from being unfair merely because such use is accompanied by the statement that the defendant himself makes the goods, even conceding that he is using the plaintiff's formula.

This is the precise doctrine for which petitioner contends in the case at bar. In accordance with it, the burden is on the respondent to justify its use of the name "Webster's," by showing that its dictionary is a copy of some genuine "Webster's Dictionary." But the contrary appears. Respondent's book is different from all genuine Webster dictionaries, either ancient or modern. The decision below is in irreconcilable conflict with this controlling decision.

In *Baglin v. Cusenier Co.*, 221 U. S. 580, 31 Sup. Ct. Rep. 669 (decided May 29, 1911), the name of the liqueur "*chartreuse*" was protected at the suit of the monks, who manufactured it under a secret formula, against the official liquidator of the French Government, which had seized the monks' property upon their expulsion from France. The liquidator had, by experiment, produced *a similar liqueur, but he did not know the original and true formula.* In the court below an injunction was entered in the following form restraining the use of

"the trade-mark, '*chartreuse*' or of any colorable imitation thereof, unless so used as clearly to distinguish such liqueur or cordial from the liqueur or cordial manufactured by the complainants."

The Supreme Court, on appeal held this form of injunction erroneous for the following reason:

"It amounted, by reason of the juxtaposition with what preceded, to a permission to the defendant to use the trade-mark '*chartreuse*,' or that word, AS THE NAME OR DESCRIPTION OF ITS LIQUEUR, provided it were distinguished from the liqueur of the monks. This was inconsistent with the decree as to the ownership of the trade-mark."

The Supreme Court thereupon directed an injunction in the following form:

"And from using the word 'chartreuse' . . . as the name of, or as descriptive of, such liqueur or cordial, or without clearly distinguishing such liqueur or cordial from the liqueur or cordial manufactured by the complainants."

The Supreme Court thus distinctly recognized the rule that *the generic name of an article may not be falsely used as the generic name of a different article, even if such false use is accompanied by explanatory statements.* This was not limited to names that are trade-marks. Upon the same principle, the respondent here should not be permitted to falsely say that its books are "Webster's Dictionary." *An injunction in this case should be directed in the form above directed by the Supreme Court.* That form is precisely appropriate to the facts of this case.

In *Liebig's Extract of Meat Co. v. Liebig Extract Co.* 180 Fed. 688, 690, the Circuit Court of Appeals said:

"If the complainant is manufacturing under a secret process invented by Baron Liebig, any other person using his name in connection with extract of meat *should be enjoined unless he proves that he is using a process open to the public and known as 'Liebig's Process,'* . . . the defendant should be enjoined, because it has refused to state how it manufactures its extract of meat." *Per Ward, J.*

In the *Ogilvie* case, 149 Fed. 858, (C. C. A.) 159 Fed. 638, it was held that the expiration of copyright upon the 1847 edition of Webster's Dictionary authorized any one to publish a revised edition of that book under the name of Webster's

Dictionary, provided an explanatory statement accompanied such use of the name. This was placed upon the assumed doctrine of the *Singer* case which was deemed controlling. It is submitted that this is a misapplication of the *Singer* case, and is inconsistent with all the later cases above cited, because Ogilvie's dictionary, while actually based upon and revised from the expired Webster Dictionary was in fact a different book and not truthfully described by the name Webster's. But in any event, this decision does not aid respondent here for its book is not a revision of Webster's Dictionary, and it has used the name without any explanatory notice.

The decision below is inconsistent with both the *Ogilvie* and *Saalfeld* decisions, in that it requires no warning notice to be used, and it is inconsistent with the decisions of the Supreme Court both in that respect, and because it allows the name "Webster's" to be falsely used *as the title* of the "British Empire Dictionary."

There are numerous cases wherein the title of a book, periodical, or other literary production, has been protected by injunction against use or imitation in connection with some *different publication* which the defendant was lawfully entitled to publish and sell in competition with complainant's work and in which no question of infringement of copyright or protection of literary property was involved. *University of Oxford v. Wilmore-Andrews Pub. Co.*, 101 Fed. 443; *Social Register Assn. v. Howard*, 60 Fed. 270; *Harper v. Holman*, 84 Fed. 224; *The "Iolanthe" case*, 15 Fed. 439; *Thomas v. Lennon*, 14 Fed. 849; *Aronson v. Fleckenstein*, 28 Fed. 75, 51 L. R. A. 378; *Gannert v. Ruppert*, 119 Fed. 221; *Hogg v. Kirby*, 8

Ves. 215; *Dicks v. Yates*, 18 Ch. Div. 90; *Weldon v. Dicks*, 10 Ch. Div. 247; *Bell v. Locke*, 8 Paige Ch. (N. Y.) 75; *Matsell v. Flanagan*, 2 Abb. Pr. (N. S.), N. Y., 459; *Shook v. Wood*, 10 Phila. (Pa.) 373; *Harper v. Lare*, 103 Fed. 203 (C. C. A.); *Lare v. Harper*, 86 Fed. 481; *Borthwick v. Evening Post*, L. R. 37 Ch. Div. 449. Why should the famous Webster's Dictionary alone be denied protection?

In *Estes v. Williams*, 21 Fed. 189, the complainant's book was entitled "Chatter-box." It was published *without being copyrighted*, and therefore became *publici juris* to the same extent that every book does upon the expiration of its copyright. The defendant published a book of *different literary contents* just as respondent does in the case at bar, and entitled it "Chatter-box." His use of that title was enjoined upon the ground of unfair competition. The point here under consideration was thus disposed of by Judge Wheeler:

"Johnston had the exclusive right to put his own work, as his own, upon the markets of the world. No one else had the right to represent that other work was his—*not the right to prevent the copying of his*, and putting the work upon the markets, *but the right to be free from untrue representations that this other work was his* when put upon the markets. This gives him nothing but the fair enjoyment of the just reputation of his own work, which fully belongs to him. It deprives others of nothing that belongs to them."

This decision was followed in the later "Chatter-box" cases, decided by Judges Wheeler, Wallace and Shipman. *Estes v. Leslie*, 27 Fed. 22; *Estes v. Worthington*, 22 Fed. 822; 30 Fed. 465; 31

Fed. 154; *Estes v. Belford Clark Co.*, 30 Off. Gaz., 99.

In *Merriam v. Saalfield*, opinion on rehearing, 198 Fed. 369, it was held that the only reason why the name of a copyrighted book may be used by any one after expiration of the copyright was

“not because of any particular rule of trademark or patent law, but because the word, during the term of the monopoly, has come to be a word of apt description,—it has come to be the name of the thing, and, hence, any one who later makes the thing, may call it by its true name.”

This rule would have led to an injunction against any use of Webster in the title of Saalfield's books, instead of merely requiring a warning notice to be used, but for the fact that the Court was concluded by the doctrine of *res adjudicata*, because Saalfield stood in Ogilvie's shoes, and right or wrong, the decision in the First Circuit furnished the rule for Saalfield in the Sixth Circuit. Leave has since been granted to file a bill of review upon the ground that some of Saalfield's books are mere reprints of the English “Chamber's 20th Century Dictionary,” and hence not entitled to be called Webster's, even when accompanied by a warning notice. This bill of review is now pending, and presents the same questions here involved.

In *Metzler v. Wood*, 8 Ch. Div. 606 (also reported in 47 L. J. Ch. 625; 33 L. T. N. S. 541; 26 W. R. 577), plaintiff's book was not copyrighted, and hence entirely *publici juris*. The author's name appeared in the title. *Defendant employed the same author to prepare and edit a different work upon the same subject*, and placed the name of such editor prominently in the title. The name

of plaintiff's book was "Hemy's Royal Modern Tutor for the Pianoforte," the name of defendant's book was "Hemy's New and Revised Edition of Jousse's Royal Standard Pianoforte Tutor." The use of the name "Hemy's" *in the title* of defendant's book was enjoined, upon the ground that it was deceptive, though, of course, he had a right to use it in a properly descriptive manner, and in a way which would not deceive.

In *Dicks v. Yates*, 50 L. J. Ch. N. S. 809, Lord Justice James distinguishing unfair competition in books from infringement of copyright, said:

"There is another mode which, to my mind is wholly irrespective of, and anterior to, any copyright legislation, and that is where a man is selling a work under the name or title of another man or another man's work. There is not invasion of copyright. *It is a common law fraud.* It is to be redressed, and is capable of being redressed, by ordinary common law remedies, wholly irrespective of any of the conditions or restrictions imposed by the Copyright Acts. Suppose a man were to publish a book of cookery, calling it as 'Soyer's Cookery Book,' *which it is not*; or an arithmetic, as 'Colenso's Arithmetic,' which it is not; or 'Hemy's Pianoforte Tutor' (as in the case of *Metzler v. Wood*, before the Court of Appeal), which it is not;—that is a common law fraud."

The doctrine of unfair competition would have no application to the book trade if the expiration, of the copyright upon a book authorized the use of its title upon every and any other book to which rival publishers might see fit to apply it. Such a rule, if established, would be destructive of the name, reputation and identity of Webster's Dictionary. Soon no one would care to use that

name because of the varient and mongrel productions to which it would be applied, and of which respondent's book in this case is an instance. Petitioner's good-will, built up by vast expenditures, and over sixty years of honorable dealing, will be totally destroyed.

So long as defendant is permitted to falsely describe its book, and say that it *is* "Webster's" dictionary, it deceives the public, to petitioner's injury *as to the identity of its book*. This deception is not prevented in any degree by merely adding a statement to the effect that the book is published by defendant, and that it is not the original publisher of Webster's Dictionary, or a successor. Such a statement does not save the fraud as the Supreme Court pointed out in *Jacobs v. Beecham, supra*.

It is respectfully submitted that an injunction should have been directed restraining respondent's use of the term "Webster's Dictionary," as the title of its different book, in substantially the form adopted by the Supreme Court in the "*Chartreuse*" case (*supra*), viz.: that defendant be enjoined from

using the word 'Webster's,' either alone or in association with any other word, in connection with the publication and sale of its said dictionaries, *as the name of*, or as descriptive of, such dictionaries, or in any other manner without clearly distinguishing such dictionaries from the dictionaries of complainant.

Such a decree was affirmed in *Jacobs v. Beecham, supra*.

V.

CONCLUSION.

It is respectfully submitted that the petition should be granted, and a writ of *certiorari* issued, to review the decision below upon the ground that it is erroneous and inconsistent with controlling decisions of the Supreme Court, and with the decisions of other Circuit Courts of Appeal in like cases involving the name Webster's Dictionary, and contrary to established rules of law in cases of unfair competition.

Dated, September 10th, 1913.

WILLIAM B. HALE,
Counsel for Petitioner.



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IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1913.

G. & C. MERRIAM COMPANY,
Petitioner,

vs.

THE SYNDICATE PUBLISHING COMPANY,
Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO
THE PETITION FOR WRIT OF CERTIORARI.

HUGH A. BAYNE,
Counsel for Respondent.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

IN THE
Supreme Court of the United States.

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G. & C. MERRIAM COMPANY,
Petitioner,

AGAINST

THE SYNDICATE PUBLISHING
COMPANY,
Respondent.

**RESPONDENT'S MEMORANDUM IN OPPO-
SITION TO THE PETITION FOR WRIT
OF CERTIORARI.**

I.

This Court has once before denied this Petitioner's petition for a writ of *certiorari* to review the same questions which it again urges, in its petition in this case, are of such importance that this Court ought to review them by writ of *certiorari*.

See the petition for writ of *certiorari* in *G. & C. Merriam Company, Petitioner, versus George W. Ogil-*

vie, Respondent, in the Supreme Court of the United States, October Term, 1907.

The reasons now urged for granting the writ were then urged and rejected. Compare the Petitioner's statement of the questions which it now asks this Court to review, as set forth in its present petition, at pages 11 and 12, paragraphs 1, 2 and 3, thereof, with the corresponding statement of the questions which it then asked this Court to review in the *Ogilvie* case (*supra*) as set forth in its brief filed in support of its petition, in that case, at pages 8 and 9, paragraphs 1 and 2 thereof.

The reasons which moved the Court in 1907 to refuse to review those questions by writ of *certiorari* should be equally good to-day.

II.

If the foregoing consideration should not be conclusive against the petition, we believe that a reading of the opinion delivered by the United States District Court and followed by the United States Circuit Court of Appeals, in the present case, will satisfy the Court that no peculiar questions are presented by the judgment sought to be reviewed, but that elementary equitable principles, only, are involved.

For the convenience of the Court we have reprinted Judge HAND'S opinion at pages 3 to 13 of this memorandum, and the opinion of the Circuit Court of Appeals at page 14 hereof.

Judge Hand's Opinion.

" HAND, D. J. : The complainant has never succeeded in getting from any court a decree which would forbid the publication of a " genuine " Webster dictionary in the form in which the defendants were selling theirs at the time these suits were started. The defendants had not only conformed in every way to the terms of the decree in the case of Merriam v. Ogilvie, as it was finally entered, but they had advised the complainant of their submission to the law as there laid down and of their purpose in future to adhere to it.

The complainant brings this suit upon the theory that the book published (for the two books are nearly identical in content), is in fact not based upon Webster's dictionary at all, that it has no right to be called Webster's Dictionary in any sense, and that it is a fraud to call it such. Indeed, they do not concede that any one has any right but themselves to use the word " Webster's " upon a dictionary, unless it be one of the original dictionaries published by Webster himself, and even in that case they insist that it must be distinguished by the statement that it is one of the original Webster's dictionaries, a fact which would probably destroy any possibility of its sale anyway. Their pretension extends even to the point of forbidding the sale of any dictionary honestly compiled upon Webster's original sources, since they assert that the name " Webster," when applied to any such compilation or abridgment, necessarily implies their own responsible supervision and authorship. I have not, however, the least doubt at

the outset in overruling so extreme an assertion as this. It is quite clear that any honest compilation or abridgment at the present time of Webster's work is entitled to describe itself as such, and that the most which the complainant's supposed right could in any case do, would be adequately to indicate that a work so described was not a compilation or abridgement by the original publishers of Webster's Dictionary or their successors. Indeed, it is a preposterous assertion to say that the name "Webster's" as at present used by the complainants themselves does not indicate to the public mind that their work has some connection with Webster's original work other than that they choose to publish it, or that it need not be the result of a legitimate literary descent from his original. In other words, even though the word indicates *prima facie* that the book is the complainant's compilation, it also still indicates that it is a compilation with Webster as its original source, and it is in this sense that Judge COXE spoke when he said that the word had two meanings, a proprietary and a descriptive. Nor is there any inconsistency in such a dual meaning; the word may mean "Merriam's compilation from Webster," quite as well as "Merriam's Compilation." If it does, it must as well answer to one part of its definition as to another, in short, it must be a compilation from Webster, or it is a fraud. I pay not the least attention to those witnesses who say that it means only "Merriam's Compilation." If the name "Webster" has this descriptive significance, it is quite clear that it will also honestly describe any actual compilation

from any one of Webster's dictionaries, provided that some suffix be added to distinguish the compilation from Merriam's. The word need not by any means be confined to the original work of Webster himself. Indeed, the only authority which has ever independently given the complainant any trade rights in the name "Webster," itself refused absolutely to forbid the defendant from using the name upon what was in every sense a compilation. In *Merriam v. Ogilvie*, 149 Fed. R., 860, Judge COLT says that Ogilvie's work was an enlarged and revised edition of the Webster of 1847. Now the edition of 1847 was not by any means a Simon-pure Webster, for its title page asserts that, although it contained the whole vocabulary of the first edition in two volumes, the entire corrections and improvements of the second edition (both by Noah Webster), it had been revised and enlarged by Chauncey A. Goodrich. Just what the abridgement from two volumes to one involved and just what was the revision and enlargement of Goodrich which accompanied the abridgement added does not appear, but it does appear that the work which the Circuit Court of Appeals of the First Circuit permitted to bear the name "Webster" had passed through two revisions of one sort or another, and this is enough to dispose of the assertion that the only work which may be called "Webster" is some book just as it left the hands of Noah Webster.

The first question, therefore, which arises, is whether the dictionary in question was based upon Webster's original work in such sense that it is entitled to be known by that name. In the

solution of this question I am not disposed to enter into any nice considerations of a literary character, such, for example, as Professor Peck suggests, as to what creates a Webster's dictionary, for it is quite clear that whatever scholars may think, the public generally—and it is the public with whom we are now concerned—mean something else by the words in question. What is it that they do mean, either by a Webster's Dictionary or a dictionary based upon Webster's? It seems to me that they mean the way the book has been made up more than its present contents, its history rather than its present identity with its source. The word at least denotes what I should call literary descent from Webster's original books; that is, that each book in the series of which this is the last, was made up by its author with its predecessor before him, only changing the spelling, definition, vocabulary and the rest as his opinions, and learning, indicated to him that changes were required to adapt the book to the present; and that this succession goes back without break to some work by Webster himself. Nor is it indeed possible for the complainants to take any other position than this without putting themselves in the position of foisting upon the public a spurious work. Their own last edition, that of 1909, is a book of almost totally different literary contents from any book with which Noah Webster had anything to do. They have the alternative of accepting the definition of "Webster" as indicating this kind of descent, or of maintaining that "Webster" means any work of theirs, and has no descriptive significance whatever. Other-

wise they are within the rule in the California Fig Syrup Case. Of course, a "Webster" dictionary must own Webster as its father originally; and in the case at bar, although the heredity of the original complainants' 1909 Webster is all that gives it its character as a Webster, yet it still has that character, remote now as the content may be. The complainant is in no position to deny a purely descriptive use of the word to any other dictionary which is as legitimate as its own. The constant iteration that all such are "bogus" or not "genuine" is merely a childish extravagance.

Now, does the defendants' book answer this description as well as the complainant's? The complainant has established beyond any question, in my judgment, that the immediate basis of the Crown Dictionary was the British Empire Dictionary, which has been put in evidence in this case, and which was edited by the Rev. E. D. Price, F. G. S. The proof of this consists in the identity of the literary matter between the two, which is so great as to be substantially identical. The parties in taking testimony have proceeded upon the assumption that the kinship between dictionaries may be ascertained by examining the verbal identities in the contents. Thus, at what must have been an appalling labor, they have each prepared tables showing the identity of subject matter between the defendants' book and others. It so happens under the complainant's table, that of all those examined the closest in content to the British Empire Dictionary is Ogilvie's Imperial Dictionary of 1883. The similarity of contents extends to 70% of literal identity; that is to say

70% of the contents of the British Empire Dictionary appears verbatim in the Imperial. The identity in the case of the Concise Oxford is only 28% and of what I am tempted to call the non-Websterian group, ranges from there to about 40%. Considering the difference in time of their appearance this identity with the Imperial is adequate *prima facie* proof that the former is the literary descendant of the other, and in the absence of contradiction justifies me in so assuming, when compared with the extremely low percentages of the other more or less contemporaneous works. Certainly one who advertises that work as a Webster which has scarcely any of Webster's matter within its covers cannot afford to be too meticulous. It also so happens that the first edition of the Imperial Dictionary published in 1850 is in evidence written by the well known lexicographer John Ogilvie. The title page of this work says that it is "On The Basis Of Webster's English Dictionary", while the preface, dated December, 1849, more fully states the sources. Thus, on page iii of this preface appears the following: "In adopting Webster's dictionary as the basis of the Imperial Dictionary the great object of the editor in preparing the latter has been to correct what was wrong and to supply what was wanting in Webster in order to adapt the new work to the present state of literature, science and art. Accordingly, every page of Webster has been subjected to careful examination, numerous alterations and emendations have been made, a vast number of articles have been re-written, very many of Webster's explanations of important terms have been enlarged and many new and correct definitions of others given; new

senses have been added to old words where they were found wanting, and a multitude of new words and terms have been introduced, especially in the scientific and technological departments, so that to Webster's addition of twelve thousand to Todd's Johnson, a further addition has been made of at least fifteen thousand words and terms."

Now that is exactly what I think the public means by a "Webster" brought up to the time of its publication, and it is in exactly this sense, and only in this sense, that the complainant has any right to continue to call its present dictionaries "Webster's", whether or not it indicates the complainant's own compilations when not accompanied by any suffix. Certainly Ogilvie could have called the Imperial Dictionary either "Ogilvie's Webster" or the "Imperial Webster" or any other kind of "Webster" that he wished. The successive editions certainly were Webster dictionaries and so were any smaller works, derived from those editions, whether abridgments, condensations, or the like. Nor does it seem to me to matter that the intermediate sources did not go by the name Webster. Here, for example, is a work which comes down by precisely the same kind of line of descent from Webster that the complainant's present abridgments come, each individual in the line being formed from its predecessors by some accretion, some elimination, some amendment, till one reaches the work of Webster himself. When the public uses "Webster" does it understand that all the intermediate steps shall have been so named? I hardly think so. Rather, it seems to me, it is the fact of its unbroken descent that the word implies. Rolfe, a con-

cededly fair witness, was asked his opinion upon this question, and, while I should not feel in the least bound by it, I should be very glad to give it weight, if I could understand what he meant by his answers. He says it would justify the use of the title "Webster's dictionary" if the book were taken from Ogilvie; that is if Ogilvie could be called an English Webster, but that though justifiable it was not a natural thing to do and that he personally, from a literary point of view, should not use it. So far as this means anything, it is that in the witness's opinion the name could honestly be used. Therefore, I believe that the defendants have shown that their dictionary is really a Webster entitled to be so called quite as much as the Ogilvie dictionary in the suit of *Merriam v. Ogilvie*."

(Then follows a long discussion, regarding the competency of certain evidence, which I omit because it does not bear in any way on the questions raised by the Petition for a writ of *certiorari*.)

"Therefore the defendants had the qualified right to call their books "Webster's," provided they properly distinguished so as to cut out the secondary meaning, and the only question which can remain is whether the statement upon the title page of the books is sufficient notice, since the books are properly marked upon the back. The form of the notice is that set forth in the final decree of the Circuit Court for the District of Massachusetts as contained in 190 Fed. R. at page 931. The only criticism which I can make upon the printing at the top of the page is that it is

in rather small type. Had the attitude of the complainant been different when the defendants approached it with a view of adapting their make-up to the terms of the Massachusetts decree, I might now be willing to take up the question whether that notice ought not to be more conspicuous upon the page, but I am not disposed to indulge this complainant in such a way in the case at bar. When the defendants each approached its officers in a *bona fide* effort to accommodate themselves to the utmost rights which the complainant had up to that time enjoyed, they were met with a demand for absolute discontinuance of the name; they are met with it here. This was illegal and had been so adjudged against this complainant in the very decree which is the basis of any supposed right they may have in the name, "Webster". They certainly by such a claim absolved the defendants from any nice adaptation of their typography to the terms of that decree, and I shall not inquire whether it gives the fullest protection to which the complainant is entitled.

I have decided this case upon the assumption that the word, "Webster", had acquired a secondary meaning indicating at once the derivation of the work and its responsible compiler. That assumption I make in deference to the decision in the First Circuit, though it is in no sense authoritatively binding upon me. There are several reasons why, if it were necessary, I should not hesitate to re-examine that question of fact. In particular the defendant in that case did not contest the question, at least, after the first decision, as his briefs show, nor did he con-

test it in the case in the Sixth Circuit. Moreover, the record must have been quite different in that case for Judge COLT to say that no one but the complainant published any Webster dictionaries between 1847 and 1889, a fact abundantly disproved in the case at bar. I need not here decide the question of secondary meaning, and I accept, since it has not been necessary to question it, the result of the decision in the First Circuit, which is the first success the complainant has ever had in its long and persistent efforts to establish a monopoly over the word "Webster." Nevertheless, this case can never be truthfully cited as in the slightest degree contributing to the establishment of that result, or indicating that I assent in any way to the claim of secondary meaning. That question I leave exactly as I find it, without deciding that the meaning exists, that it does not exist, that it has been proved, or that it has not been proved.

I have looked over all the advertisements of the Syndicate Publishing Company, which make a very shoddy kind of appeal, but after the date when the defendants attempted to come to terms with the complainant they appear usually to bear the addition which the complainant procured as the measure of its relief in the Ogilvie case. As to those which do not and which for the most part are in the form of news articles, I find no evidence to contradict the *bona fides* of the defendant's efforts to conform the advertisement with the decree and I am not disposed to charge them with such as continued to appear. The prominence and form of the suffix must be held satisfactory in view of the complainant's attitude towards the defendant when approached

and its illegal claim of a monopoly in the name. If the defendant was content to yield to the terms of the Ogilvie decree, it might upon the complainant's demand have been subject to some modification of its advertisements as of its title-page. That right justified no such proceeding as this, designed to do just what the complainant was forbidden to do in the First Circuit.

As to the Cupples & Leon Company¹, I am in more doubt. The testimony of Leon is of very unsatisfactory character and his claims to a dictionary upon which the defendant had done any substantial work are not justified. The advertisements are not warranted by the facts, for it is in no sense the modern book it professes to be. I do not believe that the defendant knew or in the least cared what was its contents, if it would sell as an up-to-date book. However, that gives no rights to the complainant, so long as its own limited use of the name is not infringed. None of the advertisements attempt to pass off the books as complainant's, and it cannot object that the public is buying as a modern Webster substantially the old Crown Dictionary. The law may some day protect one man who sells a sound quality of goods so described against another who sells an unsound quality, dishonestly described, but it has not done so yet. Now we trust to the public to find out that they have been hoodwinked and to distinguish. Moreover, it does not certainly appear that the defendant is responsible for its customers' advertisements.

Both bills will be dismissed with costs."

¹ The Cupples & Leon Company was defendant in another suit brought by the Petitioner, which was argued and submitted with the suit against this Respondent.

Opinion of the Circuit Court of Appeals.

" Per curiam :

" Taken as a whole, we fully approve Judge HAND'S opinion and upon it affirm the decree appealed from. In so doing, however, we must not be regarded as assenting to the proposition that the name 'Webster's Dictionary' has a technical or secondary meaning as indicating a publication of the complainant. And, on the other hand, we must not be considered as indicating an opinion that cases cannot be presented showing unfair competition in the sale of books or as passing upon the relief which may be granted in cases of fraud.

" The decree of the District Court is affirmed with costs."

The foregoing opinions, in discussing Respondent's right to use the name " Webster's," as part of the title of its dictionary, go no further than to point out that, as Respondent's dictionary traces its literary descent back to Noah Webster's own work, and as the Petitioner's dictionary has no other relation to Noah Webster's own work than literary descent, the Petitioner could not claim that the Respondent's use of that title was less truthful than the Petitioner's use thereof. This Court should be informed, however, that Respondent's use of that title is truthful in every sense, while, in so far as that title represents to the public that the book contains a substantial proportion of Noah Webster's definitions, the Petitioner's use thereof is wholly untruthful. Respondent's book contains an essential proportion of

Webster's definitions¹, while the Petitioner's latest book, as Petitioner's own witness admitted and as Judge HAND found, "is of almost totally different literary contents from any book with which Noah Webster had anything to do" (See Judge HAND's opinion at page 6 hereof, the eighth to fifth lines from the bottom of the page).

Therefore this case presents for consideration the simple equitable principle that a trader who himself deceives the public by false labelling will not be heard by a Court of Equity.

Worden vs. California Fig Syrup Co., 187
U. S., 516.

III.

If the petition be not rejected on the grounds heretofore urged, it must be denied, we submit, for the reason that there is now pending, in this very Court, an appeal by this Petitioner from the very judgment which it asks this Court to review by writ of *certiorari*.

Respectfully submitted,

HUGH A. BAYNE,
Counsel for Respondent.

¹ Petitioner's own witness, Mawson, who compared respondent's book with Webster's dictionary of 1847, testified that he found 45 per cent. of the book "by actual" count "absolutely identical" "with Webster's Dictionary of 1847." He based his testimony on a count of about 30 pages. Defendant's witness, Prof. Peck, compared about 200 pages and found 55 per cent. of identity. Both found that 18.5 per cent. of the contents of the book consisted of new words not defined by Webster. This left only 26.5 per cent. to 36.5 per cent. of its definitions different from Webster's, these differences being due to revisions of scientific and similar terms, which Webster defined inaccurately or awkwardly.



Office Supreme Court, U. S.

MAR 19 1915

JAMES D. MAHER

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

G. & C. MERRIAM COMPANY, *Complainant-Appellant,*

vs.

SYNDICATE PUBLISHING COMPANY, *Defendant-Appellee.*

No. 217.

BRIEF IN SUPPORT OF CERTAIN CONTENTIONS OF APPELLEE.

WADE H. ELLIS,
Counsel for Appellee.

R. GOLDEN DONALDSON,
HUGH A. BAYNE,
CHALLEN B. ELLIS,
Of Counsel.

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No. 217.

SUPPLEMENTAL BRIEF.

I.

In the absence of extraneous fraud the use of Webster's name as part of the title of a revision, abridgment or amplification of his work, accompanied by the name of the publisher printed in the customary manner, does not constitute unfair competition in the business of publishing dictionaries.

The purpose of this suit is to secure for the appellant a practical advantage over all its numerous competitors in the sale of Webster's dictionaries, so as to establish a virtual monopoly of that business. This

is to be accomplished either (1) by preventing all competitors from using the word "Webster's" in the title of revisions, abridgments or amplifications of "Webster's" dictionaries which they publish and in which they use Webster's work, just as appellant does, or (2) by requiring that all such competitors using the word "Webster's" in the title shall, in addition to stating the name of the publisher at the appropriate place, add thereto a warning, the effect of which is to suggest to the public that the Webster Dictionaries issued by the appellant are the *only* ones which are really genuine and authentic.

The copyrights on the lexicographical works of Noah Webster have long since expired. At the expiration of the copyright any one had the privilege of publishing the work of Noah Webster either with or without additions and improvements, and as the dedication of the work to the public carried with it the dedication of the name by which Webster's work was known ("Webster's") any one had the right to designate the matter which he appropriated and used by the name which described it, and to do this in usual and customary ways, that is, by using it as part of the title of his book. There are and have been numerous publishers of Webster's dictionaries. The appellant desires an unrestricted use of the contents and title of the expired copyright work, while imposing upon all others a restricted use. It claims the right to use freely the name "Webster" in the titles of its dictionaries, while it seeks authority to force its competitors to some qualified use of that

title. To accomplish the purpose appellant has in view the character of this qualified use must be such as to leave in the mind of the public the impression that the dictionaries of the appellant are the "only real Webster Dictionaries." That is to be brought about either by forbidding competitors to use the word "Webster's" at all in the title (although they may use Webster's work and so state) or by requiring them, if they use "Webster's" in the title, to accompany such use with a conspicuous caution to the public which will, in effect, suggest, on the one hand, that the books offered are imitations and fraudulent, while, on the other hand, there is a book published by some one else which is the authentic and genuine Webster, and which the purchaser may secure if he so desires; thus at once condemning their own product and extolling the product of their competitor, the Merriam Co.

At page 7 of brief of counsel for appellant it is said that the appellant was entitled, in the court below, to a decree enjoining the defendant from using the name "Webster" as part of the title of its book, or requiring the defendant to use *an adequate distinguishing statement* in connection with any use of the word "Webster" in order to prevent deception.

At page 162 of the brief, counsel for appellant sets out the form of decree desired. According to this proposed decree the appellee is to be enjoined from using the name "Webster" in the title of its dictionaries, or, if the name is so used, then from using it unless accompanied by a cautionary phrase plainly

printed and prominently displayed upon the title page and outside cover, and in all advertisements or circulars in which the name "Webster's" appears. In other words, such decree would require that, though appellant is free to state what his dictionary *is* and not caution the public as to what it *is not*, each of his competitors shall be compelled to warn the public what his dictionary *is not*, this warning to relate in some way to its authenticity or reliability.

Of course appellant is not concerned with the exact language of this warning and various forms have been proposed by appellant in other cases. The material thing is that it should suggest in some way that the book offered does not really and truly contain Webster's authentic work like some other book which is available, that is, the Merriam book, and such warning is demanded *notwithstanding* that each publisher plainly states upon his title page his full and correct name as publisher, and such name is in every case *clearly* distinguishable from the "G. & C. Merriam Co."

At pages 13 to 64 of the brief, appellant argues at length this claim to thus restrict its competitors in the use of the name "Webster's."

The purport of this argument is as follows: The word "Webster's" when used in the titles of dictionaries has lost its significance as the name of the world-famous author and lexicographer—and has come to mean solely the dictionaries compiled and published by the G. & C. Merriam Company of Springfield, Mass. Therefore, when

any one uses the title "Webster's" either alone or in combination with any other descriptive word, it is just as though such person placed in the title all that appellant claims is indicated by the word "Webster's," that is "Webster's Dictionary published by the G. & C. Merriam Company, Springfield, Massachusetts"; this being the case, every such other person using the word "Webster's" is representing to the public that the book which he offers is not produced by himself but by the G. & C. Merriam Co., Springfield, Mass.; that it is necessary, therefore, in order to protect appellant, that every such person should not only state clearly and prominently that *he is the publisher* but he must add a caution to the effect that some one else who gets out another Webster *is not the publisher*, as for example, by stating that the dictionary offered by him is not the authentic Webster's dictionary, thus suggesting that some other dictionary is; that his is not a genuine Webster; that his is not in the line of the original publication of Webster's dictionary; that his is not published by the successors of the publishers of Webster's or by the original publisher of Webster's dictionary; or some other similar phrase which will indicate that the book he offers is not what it ought to be and that there *is* a book which is all that could be desired.

Thus, while the Merriams and all their competitors use the one source as the origin of their dictionaries, the Merriams are not to be required to distinguish their work from that of their competitors, but the

latter are required to distinguish their work from the Merriams'. In other words, as between the Merriam Co. and the Syndicate Publishing Co., the Merriam Co. is not required to say that their work is not ours, but we are required to say in effect that our work is not theirs, despite the fact that both works have in law an equal right to appropriate and use the former copyright matter and name of Noah Webster's dictionaries. To state this in another way, all Webster's Dictionaries are descended from the work of Noah Webster, and all have an equal right to claim that parentage; yet every publisher except the Merriams, must brand his own product as illegitimate.

Of course any "warning" such as is proposed is about as effective for the purpose appellant has in view as would be a decree forbidding entirely the use of the word "Webster's" in the title of any books published by competitors of the appellant. In one way it accomplishes *more*, for it gives to the one publisher having the unrestricted right to use the name "Webster's" the benefit of the advertising of its competitors as to the intrinsic merits of Webster's work.

As a matter of practical business the injurious effect of a cautionary notice placed on all "Webster" publications except those issued by G. & C. Merriam Co., is obvious. Every book thus labeled would exhibit something not found on any other book published, no matter what its title; something that would at once attract unfavorable attention. No matter how mild the phrasing, there is at once a suggestion

from the fact of any cautionary notice at all on the book that something is radically wrong with it. The appearance of the cover and title page of books is so well known, and the language ordinarily used thereon is so familiar to the public, that to add any explanation thereto stamps the book as extraordinary and unusual and puts the purchaser on notice that the article he is buying is not quite honest or regular. The appellant in this case knows this to be the fact and realizes *the tremendous advantage* of requiring all its competitors to put an extraordinary stamp across the face of a literary work they offer to the public. It knows what advantage can be taken of any such cautionary phrase by the salesmen of the Merriam publications in seeking to prevent the sale of rival dictionaries. How effective it would be for a salesman to point to the title page and outside cover of the competitive Webster dictionary and show that it was stamped with a sort of red flag, warning the prospective purchaser of danger, and that this warning label was required by the courts! It is impossible for the ordinary purchaser to pick up such a book, so labeled, without receiving the impression that in some way there is a confession of inferiority, if not a lack of genuineness, in the product. More than this, the caution also necessarily implies that some other publisher *does produce* a superior or the genuine article. Not only is there this condemnation of the work which would have to be stamped on the front cover and back of every competitive volume and "plainly printed and prominently displayed," in

every advertisement, circular and notice, but the expense alone of so labeling every statement as to the work is *a very material item*.¹

The net result would be to drive all other publishers out of the market and thus create an absolute monopoly in the publication of lexicographical matter, the copyright of which has long since expired, and this monopoly would be more advantageous than if the copyright were still existing and held by the Merriams, for in the one case it would be limited, while in the other it would be perpetual.

Can one publisher of the work of Webster, upon which the copyright has expired, acquire, by any means, any such right against other publishers? That is the foremost question in this case.

"The law of unfair competition" says counsel for appellant in his brief (page 9) "rests upon the principle of business morality that one person will not be permitted to pass off his goods as those of another, who has succeeded in establishing a reputation for the quality of his goods." With this introduction he cites a mass of authorities, both English and Ameri-

¹The court can take judicial notice of the fact that in ordinary newspaper size type such a notice as would be required occupies two lines; but if conspicuously displayed the number of lines increases accordingly; that in newspapers published in large cities the cost per line for book advertising probably varies from 20 cents to 30 cents per insertion. It would be fair to say that the average advertising cost would be at least 10 cents a line, or 20 cents per single insertion, in small print, or from 40 cents to \$1.50 in print twice to five times as large. In the case of an extensive newspaper campaign, such as appellee carried on, in which the space occupied by his advertisements, at current rates, would cost at current rates, \$2,500,000, it can readily be perceived that the advertising space occupied by the cautionary notice even if it represented but a hundredth part of the whole would cost at current rates \$25,000.

can, Federal and State, on the subject of unfair competition. From these he deduces the conclusion that some one concern publishing Webster's dictionary after the copyright has expired, can either prevent all others from using "Webster" in the title of their dictionaries, or require that every other publisher not only set forth his own name, as publisher, but further *explain* by a warning to the public the character of his particular publication as contrasted with that of the one publisher in question.

To meet this contention it is not necessary to review all the cases in appellant's brief, inasmuch as this court in several decisions has fully covered the subject with which the contention is concerned.

The case of *Singer Manufacturing Co. vs. June Manufacturing Co.*, 163 U. S., 169, involved the question as to the protection to which one manufacturer was entitled, who, after the expiration of the patent on his product, continued to manufacture that product and to call it by the name by which it had become known, and built up a good will for that name, as against competing manufacturers who were using the same name for the same product. In that case the Singer Manufacturing Co. had produced under a patent a sewing machine known as the "Singer." The patent expired about 1876, and competitors sprang into existence who began to manufacture machines which they called "Singer" sewing machines. Among such was the June Manufacturing Co. The June Manufacturing Co. used the word "Singer" on its machines and *imitated* in the devices cast in the

legs of the stand, in lettering, and in other ways (including the use of a dummy screw which served no purpose whatever) the machines manufactured by the Singer Company, and for a while even used the initials of the Singer Company, and in advertisements imitated the cuts and prints used by the latter company. The Singer Company claimed that the acts of the defendant constituted unfair competition and sought to enjoin the use by the defendant of the word "Singer" as a designation of its machines and also sought to enjoin the continuance of the various imitations of the machine of the Singer Company.

The first inquiry by the Court was whether the name Singer, used by the Singer Company during all the time it manufactured under the patent, and also for some time after the expiration of the patent, had come to indicate in its primary sense the class and type of machines made by the Singer Company and also continued in a secondary sense to convey to the public mind the machines manufactured by the Singer Manufacturing Co. The Court concluded that the name "Singer" applied to Singer sewing machines had come to indicate a particular type of machines and also continued to indicate the source of manufacture, that is, the Singer Manufacturing Co.

The next inquiry was: What consequences should follow from this? Has the manufacturer, on the cessation of the monopoly, the right to prevent another manufacturer from using the same name to describe a sewing machine made according to the expired "Singer" patent; or, if the original manufacturer has no

right to prevent another from making such machines and calling them by the same name, does one who makes the machine with such name enjoy the liberty without any resulting duty whatever, or is it accompanied with certain obligations and, if so, what are these obligations?

As to the first question the Court concludes that upon the expiration of the patent any one could manufacture such sewing machines using all the devices covered by the expired patent and, that, as a necessary consequence of this, any one could use the name by which the patented machine has become known.

At page 185 the Court say:

“It is self-evident that on the expiration of a patent the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property. It is upon this condition that the patent is granted. It follows, as a matter of course, that on the termination of the patent there passes to the public the right to make the machine in the form in which it was constructed during the patent. We may therefore dismiss without further comment the complaint, as to the form in which the defendant made his machines. It equally follows from the cessation of the monopoly and the falling of the patented device into the domain of things public, that along with the public ownership of the device there must also necessarily pass to the public the generic designation of the thing which has arisen during the monopoly, in consequence of the designation having been acquiesced in by the owner,

either tacitly, by accepting the benefits of the monopoly, or expressly, by his having so connected the name with the machine as to lend countenance to the resulting dedication. To say otherwise would be to hold that, although the public had acquired the device covered by the patent, yet the owner of the patent or the manufacturer of the patented thing had retained the designated name which was essentially necessary to vest the public with the full enjoyment of that which had become theirs by the disappearance of the monopoly. In other words that the patentee or manufacturer could take the benefit and advantage of the patent upon the condition that at its termination the monopoly should cease, and yet when the end was reached disregard the public dedication and practically perpetuate indefinitely an exclusive right.

The public having the right on the expiration of the patent to make the patented article and to use its generic name, to restrict this use, either by preventing its being placed upon the articles when manufactured, or by using it in advertisements or circulars, would be to admit the right and at the same time destroy it. It follows, then, that the right to use the name in every form passes to the public with the dedication resulting from the expiration of the patent."

Coming to the second question it is said :

"But it does not follow, as a consequence of a dedication, that the general power, vested in the public, to make the machine and use the name imports that there is no duty imposed on the one using it to adopt such precautions as will protect

the property of others and prevent injury to the public interest, if by doing so no substantial restriction is imposed on the right of freedom of use."

What is the measure of this duty? It is to indicate that the machine put out *is made by him*. On page 187 it is said:

"If the name is availed of by another without clearly indicating that the machine upon which the name is marked *is made by him*, then the right to use the name because of its generic signification would imply the power to destroy any good-will which belonged to the original maker.
* * *

"To compel the one who uses the name after the expiration of the patent to indicate that the articles *are made by himself* in no way impairs the right of use."

The court then states that ~~these~~ views as to the duty resting upon any one who uses a name which is in the public domain, is fully supported by numerous authorities and these authorities are reviewed.

The first is *Fairbanks vs. Jacobus*, 14 Blatchf, 337, where it was sought to restrain the defendant from making or selling an imitation of "Fairbanks" scales or calling such scales "Fairbanks" and in which it was held that, by reason of the expiration of the patents, there was not any invasion of the plaintiff's rights by the use of the name. The limit of plaintiff's right was to prevent the defendant from

pretending that the scales made by him were in fact made by another.

The next case is *Singer Mfg. Co. vs. Larsen*, 8 Biss, 151, where it was sought to restrain the defendant from the use of the name "Singer" and in which the court said that the plaintiff could not prevent other persons from manufacturing the machine and calling it the "Singer," but in doing so they must not imitate the machines made by the Singer Co. in such way as to indicate to the public that the machines manufactured by them were in reality the machines manufactured by some one else.

The next case is *Singer Mfg. Co. vs. Stanage*, 6 Fed., 279, in which case it was said that after the expiration of the patent on the Singer machine every one had an equal right to make such machines and to use the word "Singer." The court entered into no discussion of the limitations resting on such person in the use of the name, but said in effect that since the Singer Mfg. Co. had used the name of the "Singer Mfg. Co." in connection with the descriptive name "Singer" and the defendant used the name "Stewart" as the manufacturer of the "Singer" machine made by him "*no one of ordinary intelligence could suppose that the 'Stewart' manufacture was the manufacture of the plaintiff.*"

The next case is *Singer Mfg. Co. vs. Riley*, 11 Fed., 706. No ruling was made in that case as to the duty of the defendant in using the name "Singer."

The next case referred to is *Brill vs. Singer Mfg. Co.*, 41 Ohio St., 127, in which it was held that the Singer Co. could not prevent others from using the

name "Singer" on sewing machines. The obligation of the defendant was not discussed, but this court in commenting on the case says:

"It might also be inferred from the report of the case that the designation of the defendant's machine was accompanied by the statement *as to who was the manufacturer.*"

Next is the case of *Gally vs. Colt's Patent Fire-Arms Manufacturing Co.*, 30 Fed., 118, which involved the right to use the word "Universal" to describe a patented printing press, the patent on which had expired. The defendant in that case could not be said to be resorting to unfair competition because the machines which he manufactured and which bore the name "Universal" *also bore his name as manufacturer.* The following is the language of this court in stating the case referred to:

"Any manufacturer who uses the name now does so to show that he manufactures the Gally press, which he may rightfully do, and does not represent to the public that it is getting any skill or excellence of workmanship which Gally possessed, and does not induce it to believe that the presses are manufactured by the plaintiff."

The next case referred to is *Merriam vs. Holloway Pub. Co.*, 43 Fed., 450. It involved the right of the defendant to use the words "Webster's Dictionary." This court quotes from the opinion of Mr. Justice Miller in that case in part as follows:

"I want to say, however, with reference to the main issue in the case, that it occurs to me that this proceeding is an attempt to establish the doctrine that a party who has had the copyright of a book until it has expired may continue that monopoly indefinitely, under the pretense that it is protected by a trade-mark or something of that sort. I do not believe in any such doctrine, nor do my associates. When a man takes out a copyright for any of his writings or works, he impliedly agrees that, at the expiration of that copyright, such writings or works shall go to the public and become public property. I may be first to announce that doctrine, but I announce it without any hesitation. If a man is entitled to an extension of his copyright, he may obtain it by the mode pointed out by law. The law provides a method of obtaining such extension. The copyright law gives an author or proprietor a monopoly of the sale of his writings for a definite period, but the grant of a monopoly implies that, after the monopoly has expired, the public shall be entitled ever afterwards to the unrestricted use of the book."

"The contention that complainants have any special property in 'Webster's Dictionary' is all nonsense since the copyright has expired. What do they mean by the expression 'their book,' when they speak of Webster's Dictionary? It may be their book if they have bought it, as a copy of Webster's Dictionary is my book if I have bought it. But in no other sense than that last indicated can the complainants say of Webster's Dictionary that it is their book."

The next case is *Merriam vs. Famous Shoe & C. Co.*, 47 Fed., 411. In that case, as shown by the quota-

tions used, it was unnecessary to determine what form of relief should be administered if the allegations of the bill should be proved on final hearing.

In addition to the American cases, certain English cases are also referred to in the *Singer Case*.

The first of these is *Wheeler & Wilson Mfg. Co. vs. Shakespear*, 39 L. J. Ch., 36, in which Vice-Chancellor James said that he could not restrain anyone, after the expiration of patents, from using the name Wheeler & Wilson to describe a sewing machine or from representing his article as being the article which was so patented.

The next English case is *Cheavin vs. Walker*, L. R. 5 Ch. Div., 850, which involved the right of a competitor of the manufacturer under the patent, to call a filter, the patent on which had expired, by the name under which it had become known, that is, "Cheavin's patent." The court said that on the expiration of the patent the manufacture of the machine was open to all the world, and the following language is quoted from the opinion:

"The invention becomes then entirely *publici juris*. The plaintiff, and also the defendants had a right to tell the world that they were making the article according to the expired patent, and *both parties have done this*. It is impossible to allow a man to prolong his monopoly by trying to turn a description of the article into a trade-mark.

" 'Cheavin's Patent' is a correct description of the principle according to which the article was

made, and there follows a distinct statement that it was manufactured by Walker, Brightman & Co. *Therefore on this ground also the case made by the plaintiff fails."*

The next case is *Linoleum Mfg. Co. vs. Nairn*, L. R. 7 Ch. Div., 834, where the right to the exclusive use of the word "linoleum" was asserted. The substance to which the name had attached was covered by patents which had expired. Quotation is made from the opinion as follows:

"In my opinion it would be extremely difficult for a person who has been by right of some monopoly the sole manufacturer of a new article, and has given a new name to the new article, meaning that new article and nothing more, to claim that the name is to be attributed to his manufacture alone after his competitors are at liberty to make the same article."

After the quotation, this court observes:

"As the article manufactured by the defendant was clearly marked with the source of manufacture, the case was not one requiring the enforcement of the duty to designate the origin of manufacture."

Since that was the fact, the court in the *Linoleum* case said:

"There has been neither infringement * * * nor any attempt on the part of the defendant to

represent the goods which they intended to sell as goods made by the plaintiffs."

The court then reviews the Scotch and French decisions. In citing the latter cases the court refers to the distinction between the case where both competitors are using individual names as producers of an article having a name distinct from that of either manufacturer and the case where the name of the one manufacturer is also the designation of the product.

From all the cases referred to this court concludes that if an article has been patented and the patent expires and the right to make the article is thus dedicated to the public *along with the name by which it is known*,

"where another avails himself of this public dedication to make the machine and use the generic designation, he can do so in all forms, with the fullest liberty, by affixing such name to the machines, by referring to it in advertisements, and by other means."

But in thus using the name of the article

"the name must be accompanied with such indications that the thing manufactured *is the work of the one making it* as will unmistakably inform the public of *that fact*."

Applying the principles to the case before it this court ordered that the defendant be enjoined from using the word "Singer" on its machines without

specifying that such machines were the manufacture of the defendant, or to quote the language

“without clearly and unmistakably specifying in connection therewith that such machines are *the product of the defendant or other manufacturer and therefore* not the product of the Singer Manufacturing Company.”

In *Holzapfel's Compositions Co. vs. Rahtjen's American Composition Company*, 183 U. S., 1, this court cites the Singer case and applies the principles there announced to the case under consideration. In the Holzapfel case there was involved the right of one manufacturer to use the name of “Rahtjen's Composition” to describe a patent paint the patent for which had expired, as against another manufacturer who made the same article under the same name and had been so manufacturing it under the patent while it existed. Applying the principles of the Singer case, the court says:

“In the manufacture and sale of the article, of course, no deceit would be tolerated, and the article described as ‘Rahtjen's Composition’ would, when manufactured by defendant, have to be plainly described *as its manufacture*.”

The proof showed that this had been done and the article had been described as manufactured by the Holzapfels, whose name was different from that of the other manufacturers; and the injunction asked for was refused.

In *Elgin National Watch Co. vs. Illinois Watch Case Co.*, 179 U. S., 665, this court refers to the Singer case, saying that in the opinion of the court in that case it was held:

"The word 'Singer' was adopted by the Singer Company as designative of their distinctive style of machines, rather than as solely indicative of the origin of manufacture. That word constituted the generic description of the type and class of machines made by that company, and on the expiration of the patent, the right to make the patented article and to use the generic name necessarily passed to the public."

But, the court points out, it was also held, that no one could destroy whatever good-will belonged to the original maker by using the name by which the article had become known

"without clearly indicating that the machine upon which the name is marked *is made by him.*"

Where the surname of the second manufacturer is *the same as that of the first manufacturer*, who has produced the article and used his own name to describe it and has acquired a good-will for such name, then manifestly the use of his own name merely, by the second manufacturer, may not sufficiently designate the article as of his own make, as distinguished from that of the first manufacturer. In other words, when he uses his own name, he is at the same time using the name of the original manufacturer and thus

the mere use of his own name does not distinguish between the two. Therefore, in such circumstances, something else may be required. This is the purport of the cases of *Herring Hall-Marvin Safe Co. vs. Hall's Safe Co.*, 208 U. S., 554, and *L. E. Waterman Co. vs. Modern Pen Co.*, U. S., Supreme Court Advance Opinions, January 1, 1915, page 91.

What then is the final conclusion to be obtained from the "doctrine" of the *Singer Case*? It is that when a patent expires upon an article which has been patented, the manufacture of the article and use of the name by which it became known are open to all. If any one has built up a good-will, however great or small, by the use of the name as describing an article manufactured by him, he still can claim no exclusive right to use the name, but all others (having surnames clearly distinguishable from the manufacturer who has acquired the good-will so that no confusion of the names of manufacturers can result) are free to use it, provided they indicate that the article so manufactured and sold by such name is an article *made by them* by affixing their name to the product, as its producer, just as the manufacturer who has acquired the good-will has affixed his own name to the product.

Anything less than this might well enable a rival manufacturer to destroy whatever good-will his competitor has built up; anything more than that would tend to perpetuate a monopoly in the trade which it was the purpose of the laws of *limited* monopoly

(such as the patent and copyright laws) to prevent.

To say that competitors may use the same name as the apt description of the article freely and without restriction and yet trammel that use with cautionary notices would be, in the language of the court, in the *Singer case*:

“To admit the right and at the same time destroy it.”

We agree with the statement in the *Singer case* that

“To compel the one who uses the name after the expiration of the patent to indicate that the articles *are made by himself* in no way impairs the right to use.”

But to compel him to accompany that use by cautionary notices which advertises another manufacturer as the original or authentic or genuine, impairs, or indeed, commercially destroys, the right to the use.

As said by the court in *Singer Manufacturing Co. vs. Stanage*, 6 Fed., 279, cited with approval by this court in the *Singer case*, *supra*:

“While the courts are prompt to protect the property rights of any skilled person in his trade-mark or name, whereby he may have in the market the benefit of his skill and reputation, they must also guard against every effort to secure a monopoly not arising therefrom. When

a marketable product is publicly known or designated by a generic name, no one should be permitted to shut out all just competition by claiming the exclusive right to use that name. If there is a peculiar excellence, real or supposed, in his manufacture, he can establish by his trade-mark or name the right to protection against the piracy thereof; but he can not go further and insist that, independent of his personal skill or manufacture, he can cover by his trade-mark or name whatever may properly distinguish the common article which every one has a right to make or vend."

Analyzing the facts before it, in the light of the principle stated, the court said further:

"The plaintiff did adopt special names and devices to indicate what it put on the market as its manufacture, viz., 'The Singer Manufacturing Company,' imprinted on the shield and arm of the machine, etc. The defendant placed on its shield and arm the words, 'The Henry Stewart's Manufacturing Co.,' with another device. Now as each corporation had an equal right to make and vend that class of machines known in the market as 'Singer' machines, and as the defendant used neither the name nor device of the plaintiff, there is no violation of the plaintiff's trade-mark or name."

Applying the doctrine of the Singer case to the case at bar, it must be noted, first, that we have here no question of confusion of names of makers resulting from any similarity between the name "G. & C. Mer-

riam Co." and the name of any of its competitors. Therefore that branch of the subject is not here for consideration.

We may say, then, adapting the principles of the Singer case to the facts in this:

The copyright having expired on the work of Webster, and his name as describing his work having fallen into the public domain, every one has the right to use his name as describing his work and every one has just as much right to use the Webster literary material and add to it, abridge or supplement it, and use the name Webster in connection with the word dictionary, for the resulting product, as the Merriam Company has or can have. Whatever goodwill the Merriam Co. has built up can not properly be injured or destroyed by any competing publisher, by pretending that *his* work is the publication of the Merriam Company, but he must (as must also the Merriam Company) state in his book at the proper place and in his circulars, wherever the name of the publisher is given, his own name as publisher. This has been done by every publisher of Webster's Dictionary (and there have been more than seventy of them). Not only this, but each individual publisher has further identified the publication as his own by using some distinguishing word or phrase in the title, added to the words "Webster's Dictionary"—such as, "Webster's *New Standard* Dictionary," "Webster's *Imperial* Dictionary," etc., which custom the Merriams also adopted to distinguish their own books, calling them "Webster's *International* Dic-

tionary," "*Webster's New International Dictionary*," etc.

All rights the Merriams could secure by any principle of the law of unfair competition, recognized by this court, have already been observed by all the Merriam's competitors. To give the Merriams more than this by requiring all their competitors to accompany their publication with an explanation or caution, the net result of which would be to warn every customer that he is liable to be defrauded by trading with the concern whose books are so labeled, would secure to the Merriam Company for all practical purposes a monopoly in the use of the name "*Webster's*" in the titles of dictionaries—a monopoly which, when asked for directly, every court before whom they have appeared, has emphatically refused them (and there have been numerous suits). With their experience as publishers, knowing the practical effect of what they ask, they are now seeking to secure by indirection what could not be secured directly.

II.

The Secondary Meaning Theory.

In the discussion above, we have sought to demonstrate that even assuming, for the sake of argument, the full effect of all appellant's various claims, nevertheless, within the ultimate limits of the doctrine of unfair competition, as settled by this Court, the appellant would not be entitled to the relief prayed for.

But it must be understood that, in our view, the contention of the appellant that it possesses anything more than the right to the use of the name "Webster's," just as every other publisher has, after the expiration of the copyright, and that it owns a "secondary meaning" trade-mark right to the name "Webster's," is without any basis whatever in law or in fact.

The proposition, briefly stated, is that the name "Webster's" has lost its significance as the name of the well-known author, and has now come to mean, when applied to dictionaries, the publication of the G. & C. Merriam Company.

Can one publisher thus appropriate by any means the name of an author as a trade name for his publications of the work of that author after the copyright on the work has expired?

The material in the Merriam publications which entitle them to be called "Webster's" dictionaries was not the work of the Merriam Co. The word "Webster" was not a fanciful name to describe the work of the Merriam Company, but was the name of the author who did the work. That author's work had been copyrighted and his name was associated with it for nearly forty years before the Merriams had anything to do with the publication of Webster's Dictionaries. The name of Webster is famous today as the author of dictionaries. It is that fame of Webster, as such author, that the Merriams and all other publishers of Webster's Dictionaries are now making use of in selling their books. To say that the word "Webster" has lost its meaning as a sur-

name of the distinguished author, and has come to mean, in the minds of the public, the trade name for the dictionaries published by the G. & C. Merriam Co. is, at the least, somewhat startling. Is there any real warrant for such a claim?

In *Black vs. Ehrich*, 44 Fed., 793, Wallace, J., speaking of the "Encyclopedia Britannica," says:

"Neither the author nor the proprietor of a literary work has any property in its name. It is a term of description which serves to identify the work, but any other person can with impunity adopt it and apply it to any other book or to any trade commodity, provided he does not use it as a false token, to induce the public to believe that a thing to which it is applied is the identical thing which it originally designated. If literary property can be protected upon the theory that the name by which it is christened is equivalent to a trade-mark, there would be no necessity for copyright laws."

When an author gives his name to a literary production he is not establishing a trade-mark for the article to be sold, but is providing for the public an apt term which describes the product of his brain. As long as the work is copyrighted no one else can publish or sell it without his permission, calling it either by his name or by any other name. After the copyright expires *any one* is at liberty to republish the work and to use the name of the author in connection with the publication and get the benefits, in the sale of the books, of the author's fame as a writer.

When any publisher, after the expiration of a copyright, secures this, he has enough, and he has no more right to claim any *special property* in the name than he has to claim any *special property* in the literary material.

When this claim of the appellant was first asserted in the courts, in 1890, Mr. Justice Miller, before whom the case was heard, thus characterized it (43 Fed., 452):

“The contention that complainants *have any special property* in ‘Webster’s Dictionary’ is *all nonsense*, since the copyright has expired.”

Further, he said:

“I want to say, however, with reference to the main issue in the case, that it occurs to me that this proceeding is an attempt to establish the doctrine that a party who has had the copyright of a book until it has expired, may continue that monopoly indefinitely, under the pretense that it is protected by a trade-mark, *or something of that sort*. *I do not believe in any such doctrine, nor do my associates.*”

The Circuit Court of Appeals in deciding the case at bar, said of this contention:

“We must not be regarded as assenting to the proposition that the name ‘Webster’s Dictionary’ has a technical or secondary meaning, as indicating a publication of the complainant.”

We submit that the Circuit Court of Appeals was right, and that the Merriams, no matter how long their publication has continued, have not acquired any special property in the name "Webster's" or any technical or secondary meaning rights in that author's name. They have a full and free right to publish the work of Webster, to add to it and revise or abridge it, and to call the books which they sell "Webster's." No one, of course, can publish Webster's Dictionary representing that the publication is not his own, but that of the Merriam Company. But this is the limit of the rights of the Merriams.

Above all considerations of private interest in this case there is a question of public policy involved which must impress itself with special force upon the Court. Here is the work of a great man unconditionally bequeathed to popular education. The dictionary work of Webster and his name are public property. They belong to all the people as fully as do the work of Samuel Johnson and his name, or the Commentaries of Blackstone and his name. To give the slightest judicial sanction to the claim that one publisher may acquire in such works, by their publication, revision, abridgment, amplification, or what not, an interest different from, or superior to, that of any or all other publishers, would impose a distinct hardship upon the public by impairing the value of that which has come to be the property of all.

Let us see, for a moment, what the claim of the Merriams really is, in its last analysis. It may be

true that the appellants publish a good, scholarly Webster's Dictionary, but if their contention is sound, the special or superior rights they claim would be equally secure if the dictionary they publish were unreliable and worthless. In other words, if the mere claim, frequently and persistently asserted, of being early in the field, or in line of the original copyrighted publication, is sufficient to exclude all others, or to brand them as trespassers, then one of the most valuable gifts to posterity may be withheld from public enjoyment, or its use so conditioned that a better production of it must announce itself inferior, while the inferior production may parade itself as the only genuine and authentic. Such a result not only continues a monopoly after its lawful term has expired, but denies to the public the benefit of all progress and improvement.

But even if a secondary meaning could attach to the name of an author of a well known work, the facts in the case at bar wholly fail to suggest that any secondary meaning has been acquired in the name "Webster."

Complainant's contention that the word "Webster's" in the title of a dictionary has acquired a so-called secondary meaning and means the publications of the Merriam Company (Appellant's brief pp. 15, 16) is based upon the statement sought to be established by evidence at the trial that the Merriam Company was, from 1847 to 1889, the sole publishers of all Webster dictionaries.

This statement is made in the face of the finding of fact by the Court below, before whom all the evidence pro and con was submitted and heard, that the statement was "abundantly disproved in the case at bar"—and the opinion of the trial court was concurred in by the Court of Appeals (207 Fed. 515).*

It is made in the face of the record, quoted and used by counsel on both sides, containing a list of 15 other publishers of dictionaries, using Webster's work, with Webster's name in the title, and their own names as publishers, during the period to which appellant refers in speaking of "exclusive user." (Brief of appellant, pp. 57, 58; Brief of appellee, pp. 32, 34.)

Finally, the claim of appellant that a "secondary meaning" had been proven was disposed of by the Circuit Court of Appeals in the sweeping conclusion, after *its* consideration of all the testimony and the opinion of the Court below thereon, that it could not be regarded as assenting to

"the proposition that the name 'Webster's Dictionary' has a technical or secondary meaning as indicating a publication of the complainant."

Respectfully submitted,

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*The effect of a concurrence of both the lower courts on a question of fact in the case, is well settled in this court. *Ambrose vs. Stuart*, 209 U. S. 665.

